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332-965—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 228

JOHN T. WILLINGHAM AND C. A. JARVIS, PETITIONERS

v.

DANIEL MORGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RELEVANT DOCKET ENTRIES

No. 40038—In Leavenworth County District Court, Kansas

Date	*Filings—Proceedings*
1966	
July 27	Verified Complaint for Damages.
Aug. 12	Answer of defendants John T. Willingham and C. A. Jarvis.
Aug. 16	Plaintiff's Notice and Service of Interrogatories and Interrogatories.

No. T-4113—In United States District Court for the District of Kansas

1966	
Aug. 25	Petition for removal of action to the United States District Court from Leavenworth County District Court filed.
Aug. 26	Notice of removal filed.
Aug. 30	Certificate of removal from the Clerk of Leavenworth County District Court together with Verified Complaint for Damages, summons, *Answer* of deft. John T. Willingham and C. A. Jarvis, notice and service of interrogatories filed.

Date 1966	Filings—Proceedings
Aug. 31	Deft's motion to enlarge time of answer or object to the interrogatories filed.
Sep. 2	Pltf's verified motion for remand of action to the District Court for Leavenworth County, Kansas filed.
Sep. 2	Pltf's notice of motion for remand filed.
Sep. 6	Pltf's opposition to motion to enlarge time of answer filed.
Sep. 9	At Topeka, Templar—J: Deft's motion for enlargement of time to answer or object to pltfs interrogatories—passed. Pltf's motion to remand—passed. Counter designation—Pltf—Kansas City, Deft—Topeka—passed.
Sep. 14	Pltf's verified motion for order compelling answers to interrogatories, or in the alternative, for judgment by default filed.
Sep. 14	Pltf's notice of motion for order compelling answers, or, in the alternative, for judgment by default filed.
Oct. 7	Deft's motion for summary judgment filed.
Oct. 13	Deft's memorandum of authorities in support of motions for summary judgment filed.
Oct. 14	At Topeka, Templar—J: Defts motion for enlargement of time to answer or object to interrogatories—passed. Defts motion for summary judgment—passed. Pltf's motion to remand—taken under advisement. Pltf's motion for order compelling answer to interrogatories or in alternative for judgment by default—passed. Counter designation: Pltf—Kansas City, Deft—Topeka—passed. Pltf's oral motion to dismiss Cts 1, 2, 3, 8, 10—sustained.
Oct. 18	Ruling on pltf's motion to remand filed and entered. Templar—J. Pltf's motion to remand case to the State Court—overruled and denied. Pltf's granted 15 days from October 13, 1966 to file answer to the government's brief in re: Deft's motion for summary judgment. cc to Daniel Morgan, William Hergenreter and U.S. Attorney.

Date 1966	Filings—Proceedings
Oct. 24	Affidavit of John T. Willingham in support of motion for summary judgment filed.
Oct. 24	Affiidavit of C. A. Jarvis in support of motion for summary judgment filed.
Nov. 3	Pltf's opposition to defts' motion for summary judgment filed with brief in opposition to motion for summary judgment.
Nov. 8	Pltf's motion for production of documents and notice of motion for production of documents filed, and affidavit of Daniel Morgan.
Nov. 21	Defts' John T. Willingham and C. A. Jarvis reply brief filed.
Dec. 7	Pltf's rebuttal to "reply brief" of defts John T. Willingham and C. A. Jarvis filed.
Dec. 9	At Topeka, Templar—J: Deft's motion to enlarge time to answer or object to pltfs interrogatories, Pltf's motion for order compelling answer to interrogatories or in alternative for judgment by default, Deft's motion for summary judgment, Pltf's motion for production of documents, Counter designation: Pltf—Kansas, Deft—Topeka—all motions passed.
Dec. 14	Memorandum of Decision, sustaining motion of defendants Willingham and Jarvis for summary judgment filed and entered. Templar—J. Pltf's complaint against the defendants Willingham and Jarvis is dismissed. cc to Daniel Morgan and U.S. Attorney.
Dec. 14	Judgment on decision by the Court filed. Motion of deft John T. Willingham and C. A. Jarvis for summary judgment against the pltf, Daniel Morgan, be and the same is hereby granted, and the pltf's complaint and the cause of action sought to be stated therein against the defts Willingham and Jarvis is dismissed. cc to Daniel Morgan and U.S. Attorney.
Dec. 22	Pltf's motion to correct record and "Memorandum of Decision" filed. cc to U.S. Attorney.

Date	Filings—Proceedings
1966	
Dec. 23	Order sustains in part pltf's motion to correct the judgment entered by the Clerk and directs that the word "consideration" be substituted for the word "hearing", and the word "considered" be substituted for the word "heard". All other requests in the motion are denied. Court also denied pltf's motion for order compelling answer to interrogatories or in the alternative for judgment be default; denies pltf's motion for production of documents; denies pltf's petition for a writ of habeas corpus ad testificandum and denies his request as "attorney" for pltf. for issuance of subpoenas. filed and entered. Templar—J. cc to Daniel Morgan and U.S. Attorney.
Dec. 27	Amended judgment on decision by the Court filed. as per order filed December 23, 1966. cc to Daniel Morgan and U.S. Attorney.
1967	
Jan. 6	Petitioner's Notice of appeal filed. copy to U.S. Attorney
Jan. 6	Petitioner's petition for leave to prosecute appeal herein in forma pauperis filed.
Jan. 6	Petitioner's designation of record on appeal filed.
Jan. 9	Order permitting appeal in forma pauperis filed and entered. Templar—J. copy to petr.; copy to U.S. Attorney.
Jan. 10	Amended order permitting appeal in forma pauperis filed and entered. Templar—J. copy to petr; copy to U.S. Attorney.
Feb. 1	Original and two copies of record on appeal forwarded to Circuit Court at Denver.
Feb. 24	Supplemental record on appeal transmitted to Circuit Court.

No. 9281—In United States Court of Appeals for the Tenth Circuit

Date	*Filings—Proceedings*
1967	
Oct. 5	Opinion of Court of Appeals.
Oct. 5	Judgment of Court of Appeals.
Oct. 24	Motion for extension of time in which to file Petition for Rehearing.
Oct. 27	Order extending time within which appellees may file a petition for rehearing.
Oct. 30	Appellant's verified opposition to appellees' motion for further delay herein; and Appellant's verified motion for order directing Clerk not to file any Petition for Rehearing herein which has not been filed in this Court on or before October 26, 1967.
Nov. 6	Order overruling appellant's objections to extension of time for filing a petition for rehearing.
Nov. 22	Petition for Rehearing filed.
1968	
March 11	Order denying petition for rehearing.
March 22	Motion to stay mandate.
March 28	Order staying mandate for 30 days, or if petition for writ of certiorari filed within that time, until final disposition by Supreme Court.
April 16	Motion for additional stay of mandate.
May 27	Order granting motion.

No. 228—In the United States Supreme Court

1968	
June 10	Order extending time to file petition for writ of certiorari until June 24, 1968.
Dec. 9	Order of Supreme Court granting certiorari.

In the United States District Court for the District of Kansas

Civil Action No. T–4113

DANIEL MORGAN, PLAINTIFF

vs.

JOHN T. WILLINGHAM, C. A. JARVIS, THE FIRST DOE CORPORATION, THE SECOND DOE CORPORATION, THE ROE COMPANY, AND DOE NUMBERS 1 THROUGH 72, DEFENDANTS

Petition for Removal of Action to the United States District Court

[FILED AUG. 25, 1966]

Come now the above-named defendants and petitioners, John T. Willingham and C. A. Jarvis, and for their petition for removal of an action now pending in the District Court of Leavenworth County, Kansas, to the above-entitled court, say and allege:

1. That the defendant and petitioner John T. Willingham is and was at all times herein and in plaintiff's petition or complaint mentioned, the warden of the United States Penitentiary at Leavenworth, Kansas and as such is and was an officer of the United States of America and a person acting under officers of the United States of America.

2. That the defendant and petitioner, C. A. Jarvis, is and was at all times herein and in plaintiff's complaint or petition mentioned, an employee of the United States Public Health Service and assigned to the United States Penitentiary, Leavenworth, Kansas and as such is and was an officer of the United States of America and a person acting under officers of the United States of America.

3. That on or about the 27th day of July, 1966, the above-named plaintiff, Daniel Morgan, filed a civil action against the above-named defendants in the District Court of Leavenworth County, Kansas entitled; Daniel Morgan, plaintiff, vs. John T. Willingham, C. A. Jarvis, and The First Doe Corporation, The Second Doe Corporation, The Roe Company and Doe numbers 1 through 72, defendants, number 40038 upon the civil appearance docket of the District Court of Leavenworth County, Kansas, and that these petitioners were each served with a summons in said action and a copy of plaintiff's petition or

complaint filed in said action by the Sheriff of Leavenworth County, Kansas on the 28th day of July, 1966.

4. That a copy of said petition served upon these petitioners is attached hereto and marked Exhibit "A" hereto, and a copy of said summons served upon these petitioners is attached hereto and marked Exhibit "B" hereto, the summons served upon each petitioner being identical to the summons served upon the other petitioner.

5. That in said petition it is alleged, among other things as follows:

In Counts I and II, that the defendants did, with intent to wrongfully inflict harm, or injury, wilfully wantonly, and maliciously inoculate the plaintiff or cause him to be inoculated, contrary to law, with a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the user or recipient thereof, thereby causing extensive or serious injury to the heart, mind, and other vital organs of the plantiff, and thus rendering and leaving him permanently sick or ill.

In Count III, that the defendants or agents did wrongfully compel or force the plaintiff to submit, contrary to law, to inoculations of a deleterious foreign substance, serum or drug, into his arm, veins, bloodstream or body causing him to be injured in the manner and to the extent alleged in Count V of his complaint.

In Count IV, that the defendants ordered and utilized penitentiary inmates or prisoners, and other persons, not qualified or licensed to prescribe, dispense or administer dangerous drugs or to practice medicine in the State of Kansas, to inoculate the plaintiff with a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the user or recipient thereof, resulting in permanent injury to plaintiff.

In Count V, that as a direct result of the injection of a deleterious foreign substance, serum or drug, into the arms, veins, bloodstream or body of the plaintiff, plaintiff was caused to lose consciousness and fall with great force and violence on and against a concrete floor, injuring his head and various parts of his body.

In Count VI, that defendants negligently or wrongfully manufactured and engaged in the transshipment, facilitation, sale, delivery or distribution, for human use or consumption, certain

deleterious foreign substance, vaccine, serum or drug, capable of causing death or great bodily or other serious injury to the user or recipient, without attaching to the same an adequate or proper label giving notice of its dangerous or deadly qualities, and failed to include adequate directions for its proper and safe use, all of which being contrary to law and to the hurt, injury or detriment of plaintiff.

In Count VII, that as a direct result of the use by plaintiff of a deleterious foreign substance, serum or drug, wrongfully prepared, manufactured, packaged, transhipped, sold, delivered or distributed, plaintiff was caused to lose consciousness and fall with great force and violence on and against a concrete floor, resulting in the injuries described in Count V of plaintiff's complaint.

In Count VIII, that the defendants well knew that plaintiff was afflicted with a weak heart or cardiac disease and plaintiff had been inoculated with a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the user or recipient thereof, did, contrary to law and against the advice, directive or order of competent medical doctors, force or compel plaintiff to perform various strenuous tasks, work or exercises which caused serious injury to the heart and other vital organs of plaintiff and thus rendering and leaving him permanently injured.

In Count IX, the defendants did wilfully, wantonly or wrongfully, and contrary to law, assault, batter, club, choke and torture the plaintiff, severely injuring the plaintiff and various parts and members of his body.

In Count X, that the defendants had knowledge of the wrongs done in Counts I through IX of plaintiff's complaint and having power to prevent or aid in preventing the same, neglected or refused to do so and that by reason of the several torts alleged in Counts I through X of plaintiff's complaint, the plaintiff's health has been undermined, impaired and adversely affected, as a result of which he will be required to pay medical bills or expenses for the remainder of his life to relieve him of the hurt, pain and suffering occasioned by his injuries and plaintiff's earning power has been reduced to virtually zero percent.

6. That in said petition, plaintiff seeks judgment against the petitioner, John T. Willingham, in the total sum of $2,220,000.00 and a judgment against the petitioner, C. A. Jarvis, in the total sum of $1,065,000.00.

7. That plaintiff is and was at all times herein mentioned, or in plaintiff's petition or complaint mentioned, a duly committed prisoner or inmate of the United States Penitentiary at Leavenworth, Kansas.

8. That any act or thing that these petitioners, or either of them may have done or authorized to be done concerning the plaintiff as alleged and complained of by plaintiff in his said complaint or petition, was done and made by them in the course of their duties as officers of the United States of America and as persons acting under officers of the United States of America and under color of such offices and by virtue thereof; namely, as warden of the United States Penitentiary at Leavenworth, Kansas and as an employee of the United States Public Health Service assigned to the United States Penitentiary at Leavenworth, Kansas, respectively; and that the acts complained of were made solely under color of their respective offices and within the scope of their authority.

9. That pursuant to the provisions of Title 28, United States Code, section 1442(a)(1), these petitioners are entitled to have said action in the District Court of Leavenworth County, Kansas aforesaid removed to the United States District Court for the District of Kansas.

10. That these petitioners do not know the identity of any of the persons referred to as First Doe Corporation, Second Doe Corporation, Roe Company and Doe numbers 1 through 72, as co-defendants with these petitioners in said action in the District Court of Leavenworth County, Kansas.

11. That this petition is being filed within thirty days after the receipt by petitioners through service of a copy of the initial pleading setting forth the claims for relief upon which such action is based, and within thirty days after the filing of said suit in the District Court of Leavenworth County, Kansas.

12. That in accordance with Rule 6 of the Rules of Practice of this Court and 28 U.S.C. 1446(d), a bond with good and sufficient surety, approved by the Clerk of this Court, conditioned that the petitioners will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that said action was not removable, or was improperly removed, accompanies and is being filed contemporaneously with this removal petition.

WHEREFORE, the above premises considered, these petitioners pray that said action in the District Court of Leaven-

worth County, Kansas, aforesaid be removed to the United States District Court for the District of Kansas at Topeka, Kansas, and that no further proceedings be had in said action in the District Court of Leavenworth County, Kansas.

JOHN T. WILLINGHAM,
Petitioner.

C. A. JARVIS,
Petitioner.

AFFIDAVIT

STATE OF KANSAS
County of Leavenworth, ss:

JOHN T. WILLINGHAM and C. A. JARVIS, each of lawful age, and each having been first duly sworn according to law, upon his respective oath says and deposes:

That they are one and the same persons as the above-named defendants John T. Willingham and C. A. Jarvis, respectively, and as such are the petitioners in the above and foregoing petition for removal. That each has read the above and foregoing petition for removal and is acquainted with and understands the contents thereof; and that all the allegations, statements and averments therein contained are true and correct.

Further, each affiant saith naught.

JOHN T. WILLINGHAM,
Affiant.

C. A. JARVIS,
Affiant.

Subscribed in my presence and sworn to before me by each of the above-named affiants, John T. Willingham and C. A. Jarvis, at my office in the City of Leavenworth, Leavenworth County, Kansas, this 25th day of August, 1966.

(SEAL) RAYMOND E. JONES,
Notary Public, Leavenworth County, Kansas.

My Commission Expires 1–26–67.

ATTEST: A true copy.

CHARLES W. CAHILL, *Clerk.*
By SHARON L. PRATT, *Deputy.*

Exhibit "A"

In the District Court of the State of Kansas
County of Leavenworth

Civil Action No. 40038

DANIEL MORGAN, Box 1000, LEAVENWORTH, KANSAS, PLAINTIFF

v.

JOHN T. WILLINGHAM, C. A. JARVIS (BOTH OF WHOM MAY BE SERVED WITH SUMMONS AT THE UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS) WHERE THEY ARE EMPLOYED AND IN RESIDENCE AND THE FIRST DOE CORPORATION; THE SECOND DOE CORPORATION; THE ROE COMPANY, AND DOE NUMBERS 1 THROUGH 72 (ADDRESSES OF THE ABOVE CORPORATIONS, COMPANY, AND PERSONS IS UNKNOWN), DEFENDANTS

VERIFIED COMPLAINT FOR DAMAGES

Plaintiff complains and brings this tort action under the laws of the State of Kansas against the defendants John T. Willingham, C. A. Jarvis, The First Doe Corporation, The Second Doe Corporation, the Roe Company and Doe numbers 1 through 72, jointly, and severally and in their capacity as individuals or private persons.

The amount in controversy in this lawsuit is substantially in excess of $10,000.

Because the names and addresses of the Doe defendants are at this time unknown to the plaintiff, plaintiff sues such defendants under the fictitious names of the First and Second Doe Corporation, The Roe Company, Doe numbers 1 through 72; and plaintiff hereby moves the Court for leave to amend this Complaint to include there in such persons' true name or identity whenever the same is discovered.

Plaintiff alleges and complains:

Count II

That on or about April 12, 1966, and on numerous and divers subsequent dates, at and in the County of Leavenworth, State of Kansas, defendants 1 through 3 and defendants numbers 6 through 20, and their agents, did, with intent to wrongfully inflict harm, or injury, wilfully, wantonly, and maliciously, inoculate the plaintiff or caused him to be inoculated, contrary

to law, with a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the user or recipient thereof, thereby causing extensive or serious injury to the heart, mind, and other vital organs of the plaintiff and by thus rendering and leaving him permanently sick, lame, cripple or ill.

Count II

That on or about April 12, 1966, and on numerous and divers subsequent dates, within the County of Leavenworth, State of Kansas, defendants numbers 1 through 3, and defendants numbers 6 through 20, and their agents, did wrongfully, carelessly or negligently, inject into plaintiff's arms, veins, bloodstream or body, or caused to be injected into same, contrary to law, a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the used or recipient thereof, thereby causing extensive or serious injury to the heart, mind, and other vital organs of the plaintiff, and by thus rendering and leaving him permanently sick, lame, cripple or ill.

Count III

That on or about April 12, 1966, and on numerous and divers subsequent dates, within the County of Leavenworth, State of Kansas, defendants numbers 1 through 3, and defendants number 6 through 20, and their agents, did wrongfully compel or force the plaintiff to submit, contrary to law, to inoculations of a deleterious foreign substance, serum or drug, into his arms, veins, bloodstream or body causing him to be injured in the manner and to the extent alleged in Count V of this Complaint.

Count IV

That on or about April 12, 1966, and on numerous and divers subsequent dates, within the County of Leavenworth, State of Kansas, defendants numbers 1 through 3, and defendants numbers 6 through 20, and their agents, did wilfully, maliciously, wantonly and contrary to law, order and utilize penitentiary inmates or prisoners, and other persons, not qualified or licensed to prescribe, dispense or administer dangerous drugs or to practice medicine in the State of Kansas, to inoculate the plaintiff with a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the user or recipient thereof, resulting in permanent injury to this plaintiff.

Count V

That on or about June 15, 1966, and on divers other dates, within the County of Leavenworth, State of Kansas, as a direct results or proximat cause of the wilful, negligent or wrongful dispensation, administration, inoculation and/or injection of a deleterious foreign substance, serum or drug, into the arms, veins, bloodstream or body of the plaintiff, by the defendants/ numbers 1 through 3, 6 through 20, and/or their agents, as aforesaid, plaintiff was caused to lose consciousness and fall with great force and violence on and against a concrete floor, injuring his head, neck, spine, shoulders, back, buttocks, pelvis, hips, legs, ankles and feet, arms, hands, ribs and chest; that he also suffered shock and other injuries of a permanent nature; all of which caused additional serious injury, aggravation, reaggravation and damage to the heart, mind, and other vital organs of the plaintiff, and by thus rendering and leaving him permanently sick, lame, cripple or ill.

Count VI

That on or about April 12, 1966, and for some considerable period prior thereto and on numerous and divers subsequent dates; defendants numbers 4 and 5, and defendants numbers 21 through 36, did, without regard to the health, welfare or safety of potential users or recipients, wilfully, negligently or wrongfully manufacture and engage in the transshipment, facilitation, sale, delivery or distribution, for human use or consumption, within the County of Leavenworth, State of Kansas, of a certain deleterious foreign substance, vaccine, serum or drug, capable of causing death or great bodily or other serious injury to the user or recipient thereof, without attaching to the same an adequate or proper label giving notice of its dangerous or deadly qualities, and in failing to include therewith adequate directions for its proper and safe use; all of which being contrary to law and to the hurt, injury or detriment of the plaintiff.

Count VII

That on or about June 15, 1966, and on divers other dates, within the County of Leavenworth, State of Kansas, as a direct results of the use by plaintiff of a deleterious foreign substance, serum or drug, wrongfully prepared, manufactured, packaged, transhipped, sold, delivered or distribute for human use or consumption by the defendants numbers 4 and 5, and defendants numbers 21 through 36, contrary to law, as aforesaid, plaintiff was caused to lose consciousness and fall with great

force and violence on and against a concrete floor, resulting in the injuries heretofore described in Count V of this Complaint.

Count VII

That on or about May 9, 1966, and on numerous and divers subsequent dates, within the County of Leavenworth, State of Kansas, defendants numbers 37 through 44, and defendant number 1, well knowing that plaintiff was afflicted with a weak heart or cardiac disease and that plaintiff had theretofore been inoculated with a deleterious foreign substance, serum or drug, capable of producing death or great bodily or other serious injury to the user or recipient thereof, did, contrary to law and against the advice, directive or order of competent medical doctors, out of malice and with intent to cause harm or injury to plaintiff's person, wrongfully force or compel plaintiff to perform various strenuous tasks, work or exercises which caused serious injury to the heart and other vital organs of the plaintiff, and by thus rendering and leaving him permanently sick, lame, cripple or ill.

Count IX

That on or about April 12, 1966, and on numerous and divers subsequent dates, within the County of Leavenworth, State of Kansas, defendants numbers 1 and 2, and defendants numbers 6 through 20, 37 through 77, out of malice and with intent to maim or cause irreparable harm or injury to plaintiff's person, did wilfully, wantonly or wrongfully, and contrary to law, assault, batter, club, choke and torture the plaintiff, severely injuring the plaintiff and various parts and members of his body, causing him to suffer intense misery and pain and bringing him to the threshold of death, resulting in serious injury, aggravation, re-aggravation and damage to the heart, mind, and other vital organs of the plaintiff, and by thus rendering, and leaving him permanently sick, lame, cripple or ill.

Count X

That on or about April 12, 1966, and on numerous and divers dates referred to in the several counts of this Complaint, within the County of Leavenworth, State of Kansas, defendants numbers 1 and 2, having knowledge of the wrongs done as alleged in Counts I through IX of this Complaint, and having power to prevent or aid in preventing the same, neglected or refused so to do, and which the said defendants by reasonable diligence

could have prevented; thereby wrongfully contributing to the hurt, injury, detriment and damage of the plaintiff.

That by reason of the several torts alleged in Counts I through X of this Complaint the plaintiff's health has been undermined, impaired and adversely affected, as a results of which he will be required to pay medical bills or expenses for the remainder of his life to relieve him of the hurt, pain and suffering occasioned by his injuries as aforesaid; that because of the handicap of his said sick, lame, cripple or ill condition, aggravated as aforesaid, the plaintiff's earning power has been reduced to virtually zero percent; that the afore-described torts have, also, caused the plaintiff to suffer, in an aggravated form, nervous shock, physical exhaustion, complete fatigue, extreme pain and mental anguish, and other injuries of a permanent nature.

Wherefore, plaintiff demands judgment herein against each of the defendant, as follows:

1: Against defendant John T. Willingham, the sum of $555,000; and for punitive damages, the sum of $1,665,000. For a total sum of $2,220,000.

2: Against defendant C. A. Jarvis, the sum of $355,000; and for punitive damages, the sum of $710,000. For a total sum of $1,065,000.

3, 6 through 20: Against defendants The First Doe Corporation and Doe numbers 1 through 15, the sum of $225,000 from each of the said defendants; and for punitive damages, the sum of $450,000 from each of the said defendants. For a total sum of $675,000 from each of the said defendants.

4–5, 21 through 36: Against defendants The Second Doe Corporation, The Roe Company and Doe numbers 16 through 31, the sum of $750,000 from each of the said defendants; and for punitive damages, the sum of $2,250,000 from each of the said defendants. For a total sum of $3,000,000 from each of the said defendants.

37 through 44: Against defendants Doe numbers 32 through 39, the sum of $315,000 from each of the said defendants; and for punitive damages, the sum of $945,000 from each of the said defendants. For a total sum of $1,260,000 from each of the said defendants.

45 through 77: Against defendants Doe Numbers 40 through 72, the sum of $200,000 from each of the said defendants; and for punitive damages, the sum of $600,000 from each of the

said defendants. For a total sum of $800,000 from each of the said defendants.
7–25–66

(Signed) DANIEL MORGAN,
Plaintiff and Attorney for the Plaintiff.

Verification

State of Kansas,
County of Leavenworth, ss:
Subscribed and sworn to before me by Daniel Morgan this —— day of July, 1966.
A person authorized by Act of Congress to administer Oaths.

Jury Demand

Plaintiff hereby demands trial by jury on all issues of fact in the above entitled cause.

(Signed) DANIEL MORGAN,
Attorney for Plaintiff.

[Caption Omitted]

NOTICE OF REMOVAL

[Filed Aug. 26, 1966]

TO THE ABOVE-NAMED PLAINTIFF, DANIEL MORGAN:

You are hereby notified and will take notice that the defendants, John T. Willingham and C. A. Jarvis, have filed in the United States District Court for the District of Kansas, at Topeka, Kansas, their Petition for removal of an action commenced by you in the District Court of Leavenworth County, Kansas, entitled Daniel Morgan, plaintiff, vs. John T. Willingham, C. A. Jarvis, The First Doe Corporation, The Second Doe Corporation, The Roe Company, and Doe numbers 1 through 72, No. 40038 on the civil appearance docket of the District Court of Leavenworth County, Kansas, from the District Court of Leavonworth County, Kansas to the United States District Court for the District of Kansas at Topeka, Kansas; that a copy of said Petition for removal and all exhibits thereto and a

copy of the Removal Bond given by said defendants are attached hereto and made a part of this Notice of Removal, as though repeated at length herein.

NEWELL A. GEORGE,
United States Attorney.
By /S/ Elmer Hoge
ELMER HOGE,
Assistant U.S. Attorney,
District of Kansas,
P.O. Box 1537, Topeka, Kansas 66601.

CERTIFICATE OF MAILING

I, the undersigned, Elmer Hoge, Assistant United States Attorney for the District of Kansas and attorney for the defendants, John T. Willingham and C. A. Jarvis, do hereby certify that I caused a copy of the above and foregoing Notice of Removal to be mailed in a franked envelope from the United States Post Office at Topeka, Kansas, on the 25th day of August, 1966, to the above-named plaintiff, Daniel Morgan, addressed to him at P.O. Box 1000, Leavenworth, Kansas.

I do further certify that I do not know the true names, principal offices, places of business or business office addresses of the defendants, The First Doe Corporation, The Second Doe Corporation and the Roe Company, or any attorneys representing them; and I do not know the identity, place of residence or post office address of any of the defendants, Doe numbers 1 through 72 or any attorneys representing said parties.

/S/ Elmer Hoge
ELMER HOGE,
Assistant U.S. Attorney.

In the District Court of the State of Kansas
County of Leavenworth

No. 40038

DANIEL MORGAN, PLAINTIFF

v.

JOHN T. WILLINGHAM, ET AL., DEFENDANTS

To: Mr. John T. Willingham, Defendant, Warden, United States Penitentiary, Box 1000, Leavenworth, Kansas.

NOTICE AND SERVICE OF INTERROGATORIES

You will please take Notice, and Notice is hereby given, that the undersigned plaintiff has propounded and submitted certain interrogatories which you are required by law to answer under oath; and you are also required, within 15 days of the date last below written, to file your answers to said interrogatories with the clerk of the above entitled Court and to furnish the plaintiff with a full and true copy of such answers.

A full and true copy of said interrogatories, annexed hereto and made a part hereof for all purposes, is herewith served on you.

Failure to answer said interrogatories or to file your answers thereto with the clerk of Court, and to furnish the plaintiff with a full and true copy thereof, within the time designated in this Notice, may result in entry of default judgment against you in the above entitled cause.

Dated: 8–16–66

DANIEL MORGAN,
Plaintiff and Attorney for the Plaintiff.

In the District Court of the State of Kansas, County of Leavenworth

No. 40038

Daniel Morgan, PLAINTIFF

v.

John T. Willingham, ET AL., DEFENDANTS

To: Mr. John T. Willingham, Defendant, United States Penitentiary, Box 1000, Leavenworth, Kansas.

INTERROGATORIES

1. What is your full name?
2. When and where were you born?
3. (a) What is you home address?
(b) What is your business address?
4. (a) What is you occupation, trade, profession or business?
(b) Have you completed a 4-year college course?
5. By whom are you employed?
6. Who is your immediate superior and where is he located?
7. Are you also self-employed?
8. As Warden, have you executed a performance bond?
(b) If so, give the name and address of the organization or company which posted such bond?
9. How long have you been employed by the Bureau of Prisons?
10. How long have you been employed in your present position as Warden?
11. (a) What positions (naming them) have you held with the Bureau of Prisons?
(b) Describe briefly the duties you were required to perform in the several posiitons which you held with the Bureau prior to your appointment as Warden of the United States Penitentiary at Leavenworth, Kansas.
12. What are your duties, in detail, as Warden of said penitentiary?
13. Have you read the Complaint on file in this case?
14. (a) Were you continuously the Warden of said penitentiary from and after March 3, 1966, up to and including the date of your answer to this interrogatory?

(b) Did you know that, during the period mentioned in subparagraph (a) hereof, inmates of the penitentiary were inoculated with various serums, vaccines or drugs?

15. (a) Did you at anytime during your tenure as Warden authorize or permit inmates of the penitentiary, including the plaintiff, to be inoculated with various serums, vaccines or drugs?

(b) If so, give the date or dates on which you authorized or permitted inmates to be inoculated. Also give the name and address of the party or parties to which such authorization or permission was granted, and state whether the same was oral or written.

16. What were the trade names of the varous serums, vaccines or drugs used to inoculate inmates, including the plaintiff, during your tenure as Warden, and from what source were the same purchased or obtained (state the name and address of the manufacturer, seller and/or distributor)?

17. (a) Were inmates authorized, permitted or ordered to inoculate other inmates with serums, vaccines or drugs?

(b) When did you initially learn that inmates were ordered or allowed to inoculate other persons with various serums, vaccines or drugs?

(c) Did you sanction or approve such procedure or practice?

18. (a) Did you know that some of the various serums, vaccines or drugs with which inmates, including the plaintiff, had been inoculated were capable of producing death or great bodily or other serious injury to the recipient thereof?

(b) Did you know that some of the serums, vaccines or drugs used to inoculate inmates, including the plaintiff, could cause cancer?

19. (a) Prior to the actual inoculation of inmates, including the plaintiff, with various serums, vaccines or drugs did you discuss or consider with Dr. C. A. Jarvis any program dealing with the use or handling of dangerous drugs for inmates?

(b) If so, give the date of such discussion or conference; and if other persons attended the same, state their name and address?

20. (a) Did you see or inspect any of the various serums, vaccines or drugs which were used to inoculate inmates, including the plaintiff?

(b) Did you observe any label or direction accompanying such serums, vaccines or drugs with respect to its use, or which

contained a warning indicating that it was capable of producing death or great bodily or other serious injury to the recipient thereof?

21. During your tenure as Warden did you personally observe inmates being inoculated with various serums, vaccines or drugs?

22. Before answering the following interrogatories please investigate the subject matter thereof:

(a) After making investigation, do you now know that inmates did inoculate, and have been allowed to inoculate, other persons with various serums, vaccines or drugs?

(b) What are the names and numbers of the inmates whom you ascertained, after investigation, inoculated other persons with various serums, vaccines or drugs?

(c) What is the name and address of the person (or persons) who ordered or permitted inmates to inoculate other persons with various serums, vaccines or drugs?

23. (a) Is a medical record of each inmate required to be kept at the penitentiary?

(b) Do you have access to, or custody and/or control over, such medical records?

24. (a) Have you read or examined the medical record of the plaintiff?

(b) Was a portion of the plaintiff's medical record, now on file at the penitentiary, transferred to your custody by the Department of Corrections for the District of Columbia?

(c) Have you discussed the plaintiff's medical record with anyone?

(d) If so, with whom and for what reason? Also state number of times you discussed said medical record.

25. (a) Were you aware of the fact that from March through a part of July, 1966, the plaintiff was given various serums, vaccines or drugs?

(b) Were you aware of the fact that, during the period mentioned in sub-paragraph (a) hereof, the plaintiff was forced to take such serums, vaccines or drugs against his will and consent?

(c) If your answers to the interrogatories contained in sub-paragraphs (a) and (b) hereof are in the affirmative, state when you first became aware of the facts alluded to in said interrogatories.

26. (a) Did you know that the plaintiff was hospitalized on two (2) occasions during June 1966?

(b) Did you know that during May and June, 1966, the plaintiff lost consciousness and fell on concrete flooring injuring himself?

(c) If your answers to the interrogatories contained in sub-paragraph (a) and (b) are in the affirmative, when did you first learn of the facts alluded to in said interrogatories?

(d) What, if anything, did you do about the injuries which the plaintiff sustained?

27. Did you ever visit or go to see the plaintiff while he was confined in the hospital or infirmary?

28. (a) Did any of your superiors order or instruct you, either orally or in writing, to permit inmates under your care to be inoculated with various serums, vaccines or drugs?

(b) If so, from whom and on what date did you receive such order or instruction? In addition to stating such superior's official position or title, give his name and address.

29. (a) Have you transmitted a written report to your superiors setting forth your version of the facts in this case?

(b) If so, to whom and on what date did you transmit such report?

30. (a) Have you discussed this case, or your involvement herein, with any person employed by the Bureau of Prisons, or with any person employed by the Public Health Service?

31. (a) Have you discussed this case, or your involvement herein, with any member of the United States Attorney's office for the District of Kansas, or with any one else?

(b) If your answers to Interrogatory 30(a) and to the interrogatories contained in sub-paragraph (a) hereof are in the affirmative, state with whom (giving name and address), when and where and the number of times such discussion was held.

32. (a) What are the names and current address of all persons who were acting as, or held the position of Associate Warden at the penitentiary from March 1, 1966, through August 15, 1966?

(b) Opposite each name furnished indicate the specific post or station to which such person was assigned, including the date and the hours of his tour of duty.

33. (a) What are the names and current address of all persons who were acting as, or held the position of, Chief Correctional Officer, or Chief Correctional Supervisor, at the Penitentiary from March 1, 1966 through August 15, 1966?

(b) Opposite each name furnished please indicate the specific post or station to which such person was assigned, including the date and the hours of his tour of duty.

34. (a) What are the names and current address of all persons who were acting as, or held the position of, Lieutenant at the Penitentiary from March 1, 1966, through August 15, 1966?

(b) Opposite each name furnished please indicate the specific post or station to which such person was assigned, including the date and the hours of his tour of duty.

35. (a) What are the names and current address of all custodial personnel employed at the Penitentiary from March 1, 1966, through August 15, 1966? [Before answering, see Interrogatory Number 39 which modifies this interrogatory.]

(b) Opposite each name furnished please indicate the specific post or station to which such person was assigned, including the date and the hours of his tour of duty.

36. (a) What are the names and current address of all personnel employed in the "Prison Industries" at the Penitentiary from March 1, 1966, through August 15, 1966?

(b) Opposite each name furnished please indicate the specific post or stations to which such person was assigned, including the date and the hours of his tour of duty.

37. (a) What are the names and current address of all Public Health Service personnel employed at the Penitentiary from March 1, 1966, through August 15, 1966?

(b) Opposite each name furnished please indicate the specific post or station to which such person was assigned, including the date and the hours of his tour of duty.

38. (a) What are the names and current address of all personnel employed in the record and identification section at the Penitentiary from March 1, 1966, through August 15, 1966?

(b) Opposite each name furnished please indicate the specific post or station to which such person was assigned, including the date and the hours of his tour of duty. [In case of female employees use appropriate prefix of "Mrs." or "Miss."]

39. (a) Interrogatory Number 35 does not apply to custodial personnel who were employed "outside" of the inner compound of the Penitentiary or in the gun towers, on the dates in question, but applies only to custodial personnel who were assigned to the following units or stations located within the inner compound of the Penitentiary:

(1) "A" Building; (2) "C" Building; (3) Building "No. 63"; (4) "A & O" unit; (5) "Messhall & Kitchen"; (6) "Center Hall"; (7) "Captain's" and "Lieutenant's" offices; (8) "The Shake-down Crew"; (9) "The Goon Squad"; (10) "The Roving Detail"; (11) "Yardmen"; (12) "Escorts" and "inside extra duty officers"; (13) All "inside officers on special assignment status"; (14) All "inside officers on unassigned status"; (15) "The Hospital"; (16) "Receiving and Discharge" unit; (17) "[Illegible]" men.

(b) Interrogatory Number 35 applies to all personnel on all shifts or watches who were assigned to duty at the units or stations designated and described in sub-paragraph (a) thereof.

(c) With respect to furnishing the plaintiff with the date and the hours of all employee's tour of duty, such information should not include "days off" but should be confined to the period during which such employee was actually on the job or physicially present at the post or station to which he was assigned.

40. What are the names and current (or last known) address of all persons who were formerly employed at the Penitentiary from March 1, 1966, through August 15, 1966, in the several categories referred to in Interrogatories numbers 32 through 39?

41. What is the current home address of the following custodial personnel:

[Illegible]

42. (a) Did you at anytime authorize anyone to inoculate the plaintiff with an influenza, or typhoid, serum or vaccine or other virus drugs?

(b) If so, what is the name and current address of such person or persons?

(c) What was the trade name of the influenza, or typhoid, serum or vaccine, or other virus drugs, with which the plaintiff was inoculated?

(d) What is the name and address of the manufacturer, seller, dealer and/or distributor of such influenza, or typhoid, serum or vaccine, or other virus drugs?

43. On what date was the plaintiff first received at the Penitentiary?

44. During what months was the plaintiff held as a patient in the Penitentiary's hospital or infirmary?

45. Did you assign, or authorize others to assign, the plaintiff to a housing unit or cell located five (5) tiers or floors above the first floor of "A" Building?

46. Did you assign, or authorize others to assign, the plaintiff to any job, or require him to do any work, which involved any considerable physical exertion, or which involved lifting heavy objects, or which involved prolonged standing or walking?

47. (a) During your tenure as Warden, did you authorize inmates or non-medical personnel to utilize on other persons any of the medical techniques, procedures or services described below?

(1) Draw blood from various parts of the body; (2) perform surgery; (3) diagnose complaints of illness; (4) manufacture, prescribe and dispense drugs or medicine; (5) take cardiographs; (6) examine and test eyes; (7) examine ears and test hearing; (8) examine skin and test blood; (9) examine body and take x-rays; (10) perform various laboratory tests.

(b) Did you ever issue an order prohibiting inmates or non-medical personnel from performing any of the medical techniques, procedures or services numerically described in sub-paragraph (a) hereof?

48. (a) Are you now, or have you ever been, a member of the Klu Klux Klan?

(b) Are you now, or have you ever been, a member of the White Citizens' Council?

(c) Are you now, or have you ever been, a member of any anti-Negro group or organization?

(d) Do you advocate or practice the "doctrine of white supremacy"?

(e) Is it not true that as Warden you have bitterly opposed the advancement of Negroes?

49. (a) Of the total number of all personnel employed at the Penitentiary, what percent is Negro?

(b) Of the total number of all inmates confined at the Penitentiary, what percent is Negro?

(c) Do you have Negro personnel on your Classification Committee or on other administrative or policy making committees? If so, name it.

(d) Do you have Negro personnel on your staff of Correctional Supervisors holding the position of a Correctional Supervisor?

(e) Do you have Negro personnel on your "Court staff" which handles disciplinary matters and metes out punishment to inmates?

(f) Are there any Negro parole officers employed at the Penitentiary?

(g) Are there any Negro personnel employed in the Record and Identification Section at the Penitentiary?

(h) Are there any Negro Public Health Service personnel employed at the penitentiary?

(i) 1. Do you employ at the Penitentiary members of the Klu Klux Klan, the White Citizens' Council, or other persons who belong to anti-Negro groups or organizations? Do you give preference in employment to persons who are anti-Negro?

2. Do you have personnel employed at the Penitentiary who are, or were, members of the Klu Klux Klan, the White Citizens' Council, or of other anti-Negro groups or organizations?

(j) Of the total number of clerical or "white collar" jobs which you assigned to inmates, what percent is held by Negroes?

(k) Of the total number of all menial or laborious jobs which you assigned to inmates, what percent is held by Negroes?

(l) Of the total number of all disciplinary reports filed against inmates during 1966, what percent was filed against Negroes?

(m) Of the total number of all inmates who received disciplinary punishment during 1966, what percent was Negro?

(n) Of the total amount of all money disbursed among inmates as "meritorious award money" for work performed during 1966, what percent did you award to Negroes? (This does not include money disbursed among inmates employed in the "Prison Industries" created by Act of Congress.)

(o) Did you assign a guard to attend "black" muslim religious services with instructions to take down in writing, and submit to you, everything that was said and done during such services, including the sermons and other rituals of that religion?

(p) Did you likewise assign a guard to attend any non-"black"-muslim religious services for the purpose of taking its proceedings down in writing?

50. Did you have the plaintiff Daniel Morgan execute release form PHS–4573–1, or any other form of release, prior to his inoculation with various serums, vaccines or drugs?

51. (a) Do you drink alcoholic beverages?

(b) Are you an alcoholic, or addicted to the use of alcohol?

(c) Have you had to take "time off" because of "acute chronic alcoholism"?

(d) What is the present state of your health?

52. (a) Have you shown to or discussed with any person any of these interrogatories?

(b) If so, what is the name and current address of such person or persons?

53. (a) Were you on leave of absence at anytime during March, April, May, June, July or August, of 1966?

(b) If so, answer the following:

1. During the period in question, how many times were you on leave of absence?

2. What kind of leave of absence did you take?

3. What dates were you on such leave of absence?

4. What is the name and address of the person (or persons) who served as acting Warden during each such leave of absence?

54. (a) Were you physically absent from the Penitentiary on official business, or otherwise, between the hours of 7:30 A.M. to 4:00 P.M., on any day during March, April, May, June, July or August, of 1966?

(b) If so, answer the following:

1. During the period in question, how many times were you physically absent?

2. On what dates were you physically absent?

3. What is the name and address of the person (or persons) who became acting Warden during each such absence?

55. (a) Do you know the name of any person, organization, or others, who may be involved in this case which has not been mentioned in these interrogatories or in your answers thereto?

(b) If so, what is the name and current address of such person, organization, or others?

56. (a) Do you possess or have knowledge of any written report containing information relevant to this case which has not been mentioned in these interrogatories or in your answers thereto?

(b) If so, what is the title or style of such report (or reports), its date, and the name and current address of its author?

57. What is Mr. Zarter's full name, his current home address, and the position in which he is employed at the Penitentiary?

58. (a) Were you physically present within the inner compound of the Penitentiary between the hours of 7:30 A.M. to 4:00 P.M., on July 7 and July 8, 1966?

(b) If so, answer the following:

1. During the period in question, did you visit Associate Warden Harris' office (give date, number of visits made and hour of visits)?

2. During the period in question, what other places did you visit within the said inner compound (give date, places visited and number of times and hour of visits)?

3. Have you named all of the places which you visited (or went to) within the said inner compound during the period in question? If not do so now.

59. Have you answered truthfully, without purpose of evasion and to the best of your ability, all of the interrogatories hereinabove propounded and submitted to you?

In the District Court of the State of Kansas County of Leavenworth

No. 40038

DANIEL MORGAN, PLAINTIFF

v.

JOHN T. WILLINGHAM, ET AL., DEFENDANTS

PROOF OF SERVICE

Daniel Morgan, being duly sworn according to law, deposes and says:

I hereby certify that on the date last below written I served the defendant John T. Willingham with the following described documents, filed in the above entitled cause, by placing a copy of the same in the hands of the said defendant's duly authorized agent located at the United States Penitentiary at Leavenworth, Kansas:

1. "Notice and Service of Interrogatories";
2. "Interrogatories";
3. A copy of this "Proof of Service."

Further affiant sayeth not.

DANIEL MORGAN,
Affiant and Plaintiff.

Subscribed and sworn to before me this —— day of ——— 1966.

In the United States District Court for the District of Kansas

Civil Action No. T-4113

DANIEL MORGAN, PLAINTIFF

vs.

JOHN T. WILLINGHAM, C. A. JARVIS, THE FIRST DOE CORPORATION, THE SECOND DOE CORPORATION, THE ROE COMPANY, AND DOE NUMBERS 1 THROUGH 72, DEFENDANTS

Motion to Enlarge Time of Answer

[Filed Aug. 31, 1966]

Comes now the defendant, John T. Willingham, and moves the Court for an order enlarging the time to answer or object to the Interrogatories served on said defendant in the above-entitled action August 16, 1966, for the reason that James R. Ward, Assistant United States Attorney, defendant's counsel, was on vacation at the time said Interrogatories were received by the defendant and said counsel did not learn of the service of said Interrogatories on said defendant until August 29, 1966, and he has had insufficient time to review and obtain the necessary information to answer or object to the questions propounded in said Interrogatories.

NEWELL A. GEORGE,
United States Attorney.

By /s/ James R. Ward
JAMES R. WARD,
Assistant United States Attorney, District of Kansas, P.O. Box 1537, Topeka, Kansas 66601, Attorney for Defendants.

Certificate of Mailing

I, the undersigned, James R. Ward, Assistant United States Attorney for the District of Kansas and attorney for defendant John T. Willingham, do hereby certify that I caused a copy of the above and foregoing Motion to Enlarge Time Of Answer to be mailed in a franked envelope from the United States Post Office at Topeka, Kansas, on the 31st day of August, 1966, to

the above-named plaintiff, Daniel Morgan, addressed to him at P. O. Box 1000, Leavenworth, Kansas.

/s/ James R. Ward
JAMES R. WARD,
Assistant U.S. Attorney.

[Caption Omitted]

VERIFIED MOTION FOR REMAND OF ACTION TO THE DISTRICT COURT FOR LEAVENWORTH COUNTY, KANSAS

[Filed 9–2–66]

Comes now the plaintiff, Daniel Morgan, and for his verified motion for remand of the above styled cause to the District Court of Leavenworth County, Kansas, from whence it was removed by the defendants Willingham and Jarvis, and shows unto this Honorable Court as follows:

1. That on July 27, 1966, the plaintiff, suing the defendants under the laws of the State of Kansas, filed a "Verified Complaint For Damages" in the District Court for Leavenworth County, Kansas, wherein the removing defendants, John T. Willingham and C. A. Jarvis, were "jointly and severally" charged, along with 75 co-defendants, with torts committed "in their capacity as individuals or private persons." (See "Verified Complaint for Damages", page 2, on file herein.)

2. That on the same July 27, 1966, the said District Court for Leavenworth County issued summons to these removing defendants; that on July 28, 1966, the sheriff of Leavenworth County, Kansas, duly served each of the said defendants with summons along with a copy of the said complaint. (See "Summons and Return on Service of Summons" on file herein.)

3. That on August 15, 1966, the United States Attorney for the District of Kansas, filed in the said District Court of Leavenworth County what purported to be the "Answer of Defendants John T. Willingham and C. A. Jarvis", denying in general terms the accusations of the Complaint. (See "Answer of Defendant John T. Willingham and C. A. Jarvis" on file herein.)

4. That on August 16, 1966, the plaintiff served the removing defendant Willingham with copy of "Notice And Service Of Interrogatories" and accompanying "Interrogatories" with attached "Proof Of Service".

5. That the original of the said "Notice And Service Of Interrogatories" and accompanying "Interrogatories" with attached "Proof Of Service" were filed in the said District Court for Leavenworth County on August 18, 1966. (See "Notice And Service of Interrogatories", "Interrogatories" and "Proof Of Service" on file herein.)

6. That the time within which the defendant Willingham was required to file his answers to the said interrogatories expired at the close of court business on August 31, 1966.

7. That on August 25, 1966, the said defendants filed herein their "Petition For Removal Of Action To The United States District Court" from the said District Court of Leavenworth County; that contemporaneously with the filing of their removal petition the said defendants filed a surety bond with this Court in accordance with Rule 6 of the (local) Rules of Practice.

8. That in the said Complaint For Damages it is affirmatively alleged, *inter alia*, that these removing defendants, acting in concert and out of personal hatred or malice toward the plaintiff, and with intent to maim or cause irreparable harm or injury to plaintiff's person, did forcibly inoculate the plaintiff, or caused him to be inoculated, with drugs which they knew were physically harmful and unfit for human use or consumption, resulting in permanent injury to the plaintiff; that these removing defendants, acting in concert and out of personal hatred or malice toward the plaintiff, did, contrary to law, assault, batter, club, choke and torture the plaintiff bringing him to the threshold of death, inflicting serious injury, aggravation, reaggravation and damage to the heart, mind, and other vital organs of the plaintiff leaving him permanently sick and lame.

9. That these removing defendants were not employed nor were they under any obligation or duty to the United States to commit any of the several torts alleged against them in the Complaint.

10. That the said defendants were not acting in the regular or normal course of their employment, or in the performance of their official duties, as officers of the United States at the time they were engaged in and committed the several torts alleged against them in the Complaint, rather they were thus engaged as common or equal partners on a *frolic* of their own which had no relevancy to their official duties as employees or officers of the United States.

11. That not only are these removing defendants personally liable to the plaintiff under the laws of the State of Kansas for their deadly assaults, batteries, tortures and malpractices inflicted against him, but they are also criminally liable for their alleged misdeeds.

12. *That the allegations of the verified Complaint amply describe these removing defendants to be common tort feasors acting far beyond the scope of their lawful authority.*

13. That for the foregoing reasons these removing defendants do not come within the purview of Title 28 United States Code, Section 1442(a)(1), and they are, therefore, not entitled to the removal provisions thereof.

14. (a) That these removing defendants have dealt with and know the identity or true names of each and all of the persons referred to as their co-defendants in the said Complaint and in the above styled cause.

(b) That the plaintiff has sought by interrogatories, duly propounded to the defendant Willingham, to learn the true identity of the several Doe defendants herein so that he may amend the Complaint "to include therein such persons' true name or identity whenever the same is discovered." (See Complaint, page 2.) To date, the defendant Willingham has not seen fit to answer any of the said interrogatories.

15. That this motion is made and based on the files, papers, proceedings and records heretofore obtained in the District Court for Leavenworth, Kansas, in the case of "Daniel Morgan, plaintiff, vs., John T. Willingham, C. A. Jarvis, et al., No. 40038", as well as the files and records of this Court in the above styled cause.

Wherefore, in consideration of the premises, the plaintiff respectfully moves this Honorable Court to remand this cause to the District Court of Leavenworth County, Kansas, and that no further proceedings be had in said cause in the United States District Court for the District of Kansas; that the plaintiff be allowed his costs for the improper removal of said cause.

Dated: 8-31-66

/s/ Daniel Morgan
DANIEL MORGAN,
Movant and Attorney for Movant.

AFFIDAVIT

STATE OF KANSAS,
County of Leavenworth, ss:

Daniel Morgan, being first duly sworn according to law, deposes and says:

That he is the person named as the plaintiff in the above styled cause and as such is the movant in the foregoing and annexed motion for remand; that he has read the said motion for remand and is acquainted with and understands the contents there; and that all the allegations, statements and averments therein continued are true and correct.

Further affiant sayeth not.

DANIEL MORGAN,
Affiant.

Subscribed and sworn to before me this 31st day of August, 1966.

Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

A. T. MILLER, *Class. & Parole.*

[Caption Omitted]

VERIFIED MOTION FOR ORDER COMPELLING ANSWERS TO INTERROGATORIES, OR, IN THE ALTERNATIVE, FOR JUDGMENT BY DEFAULT

[Filed Sep. 14, 1966]

Comes now the plaintiff, Daniel Morgan, and for his verified motion for an order compelling answers to interrogatories, or, in the alternative, for judgment by default, and shows unto this Honorable Court as follows:

1. That on July 27, 1966, plaintiff filed a Complaint For Damages against the defendant John T. Willingham, and others, in the District Court for Leavenworth County, Kansas, wherein the above styled cause was lately pending.

2. That on August 15, 1966, Newell A. George, United States Attorney for the District of Kansas, by James R. Ward, Assistant United States Attorney for the District of Kansas, filed an Answer to the said Complaint in the said District Court for Leavenworth County, ostensibly on behalf of the defendants John T. Willingham and C. A. Jarvis.

3. That on August 16, 1966, plaintiff served the defendant Willingham with "Notice and Service of Interrogatories", a

copy of the "Interrogatories" and attached "Proof of Service" in the above styled cause.

4. That on August 18, 1966, originals of the documents mentioned in paragraph 3 hereof were filed by the plaintiff in the said District Court for Leavenworth County in said cause.

5. That on August 25, 1966, Newell A. George and Elmer Hoge, Assistant United States Attorney for the District of Kansas, filed, in this Court in the above styled cause, their appearance as counsel of record for the defendants John T. Willingham and C. A. Jarvis.

6. That on the same August 25, 1966, the defendant Willingham, through the said Newell A. George, by the said Elmer Hoge, filed herein his petition for removal of said cause from the District Court for Leavenworth County, Kansas, to this Court for trial, accompanied by the removal bond required pursuant to 28 U.S.C. 1446(d) and in accordance with Rule 6 of the Rules of Practice of this Court.

7. That on August 26, 1966, the defendant Willingham, through the said Newell A. George, by the said Elmer Hoge, filed, in this Court in the above styled cause, notice of said petition for removal; that a certified copy of said petition for removal of said cause was filed in the said District Court for Leavenworth County, and the clerk thereof issued a "Certificate of Removal."

8. That on August 30, 1966, plaintiff received, from the said Newell A. George, by the said Elmer Hoge, both a copy of said notice of removal and petition for removal of said cause, as well as a copy of "Entry of Appearance as counsel for defendants" Willingham and Jarvis.

9. That on August 31, 1966, the defendant Willingham, through the said Newell A. George, by James R. Ward, Assistant United States Attorney for the District of Kansas, filed, in this Court in the above styled cause, a "Motion to enlarge time of Answer", requesting "an order enlarging the time to answer or object to the interrogatories served on said defendant (Willingham) in the above-entitled action August 16, 1966", upon the ground "that James Ward, Assistant United States Attorney, defendant's counsel, was on vacation at the time said interrogatories were received by the defendant and said counsel did not learn of the service of said interrogatories on said defendant until August 29, 1966, and he has had insufficient time to review and obtain the necessary information to answer or object to the questions propounded in said interrogatories."

(On September 6, 1966, at approximately 3 p.m., a prison guard came to the solitary punishment cell wherein petitioner has been interred ever since July 8, 1966 and handed him an envelope from the clerk of Court which contained this Court's "Motion Calendar" for September 9, 1966. Among the 31 cases appearing on said "Motion Calendar", defendant's motion to enlarge time was number 31. Because of his confinement in the United States Penitentiary at Leavenworth, Kansas, plaintiff was unable to present himself before this Court for oral argument. He, therefore, has no knowledge of what transpired herein on September 9, 1966.)

10. That on September 2, 1966, plaintiff filed, in this Court in the above styled cause, a "Notice of Motion for Remand" and "Verified Motion for Remand of Action to the District Court for Leavenworth County, Kansas" for trial, accompanied by an appropriate "Certificate of Mailing."

11. That on September 6, 1966, plaintiff filed, in this Court in the above styled cause, his "Opposition to Motion to Enlarge Time of Answer", accompanied by an appropriate "Certificate of Mailing."

12. That the plaintiff has sought, unavailingly, by said interrogatories, duly propounded to the defendant Willingham, to learn the true names or identity of the numerous "Doe" defendants so that he may amend the Complaint "to include therein such persons' true name or identity whenever the same is discovered. (See page 2 of Complaint; *Cf.* pp. 813 of Interrogatories on file herein.)

13. That said Complaint names 75 persons as "Doe" defendants in this cause whose true names or identity are unknown to the plaintiff; that said Complaint alleges that the defendants Willingham and Jarvis have had dealings with each and all of the said "Doe" defendants. (See pp. 210 of said Complaint of file herein.)

14. That under the applicable rules the time within which the defendant Willingham was required to file his answers herein to said interrogatories expired on August 31, 1966.

15. That the plaintiff is entitled to prompt discovery; and where, as here, the identity of so many "Doe" defendants remains undetermined prompt discovery is not only desirable but is essential to the due and orderly administration of justice.

16. That prior to the initiation of this lawsuit, plaintiff filed in this Court on July 7, 1966, in the case of *Morgan* v. *Hamburger, et al.*, Civil Action No. T–4050, a "Petition For Con-

tempt Citation" against the defendant Willingham (which is still unheard and pending in this Court) in which it is, among other things, alleged, under oath, that said defendant Willingham ". . . did, deliberately and wrongfully, obstruct, frustrate, impair and interfere with the orderly prosecution of litigation, and of a party-litigant, in a matter pending before the Court in the above entitled cause . . ." and that "On July 8, 1966, Mr. Willingham removed the plaintiff from the general population of the prison and placed him in solitary or restricted confinement . . . and by thus preventing him from examining witnesses and from pursuing such other federal pretrial procedures as are necessary to the fair and proper prosecution of said cause . . . (and) by seizing evidence vital to the prosecution of said cause from plaintiff's locker and confiscating the same . . . (and) By intimidation of persons whom the plaintiff intends to present as his witnesses during the hearing and/or trial of said cause . . . (and) By intimidation, coercion and punishment of the plaintiff for the purpose of compelling him to abandon the prosecution of said cause . . . (and seizing) Separate medical statements or reports signed by doctors Phillips, Robinette, Lavine, Clark, Balkissoon and Overhulser, including an affidavit by Dr. Benjamin F. Phillips, all pertaining to the plaintiff's heart disease . . . (and seizing) A list containing the names of witnesses, prospective witnesses and other persons, to be interviewed, and of documents to be examined, in connection with the above entitled cause . . . (and seizing) Plaintiff's diary containing dates and factual account of events pertaining to the above entitled cause, and upon which this affiant (plaintiff here) must depend for the proper or effective preparation and prosecution of his cause of action herein . . . (and) Persons who previously informed the plaintiff of their willingness to testify in support of the prosecution in the above entitled cause now decline to do so, stating that they have been threatened by Mr. Willingham with reprisal . . . (and that) Just recently Mr. Willingham boasted that he was a part of the power structure and that this Court would accept his word over that of this affiant, and that after all the court hearings were over the affiant would still 'rot' in solitary or restricted confinement unless he abandoned prosecution of the above entitled cause." (See "Petition For Contempt Citation" in *Morgan* v. *Hamburger, supra.*)

17. That the defendant Willingham has already consumed one-fourth of the *unconditional* time permitted by Rule 14 of

this Court for completion of pre-trial discovery procedures (which is twice the period allowable for filing answers under the Federal Rules of Civil Procedure) and still he has not disclosed the identity or names of his "Doe" co-defendants.

18. That plaintiff believes, and is reasonably certain, that he will be required to propound interrogatories to or take the depositions of a substantial number of the "Doe" defendants whenever their names are discovered.

19. That the defendant's "Motion to Enlarge Time of Answer" is unjustifiably dilatory and obviously was designed to absorb the *unconditional* 4-month period permitted for completion of pre-trial discovery procedures, and to otherwise affect the substance of the defendant's answers to the pending interrogatories; that as a results of the defendant's dilatory tactics herein the plaintiff may be impelled to propound additional or supplemental interrogatories to the defendant Willingham.

20. That the defendant's failure or refusal to file, or to timely file, his anwsers to the said interrogatories may be directly attributed to his own wilful conduct and truly reflects his utter contempt for the judicial process of this Court and for the due administration of justice.

21. That unless and until the defendant Willingham reveals the identity or names of his "Doe" co-defendants the prosecution of this lawsuit will be stymied thus thwarting the due administration of justice in this case.

22. That the instant motion is also made and based on all the files, papers, proceedings and records heretofore obtained and now of record in this Court in the above styled cause.

Wherefore, in consideration of the premises, the plaintiff respectfully moves this Honorable Court for entry of a forthwith order herein directing and compelling the defendant John T. Willingham to answer instanter, and without objection, each and every interrogatory served on him on August 16, 1966, in the above styled cause, or, in the alternative, for entry of judgment by default herein against the said defendant Willingham.

Dated: 9–12–66.

/S/ DANIEL MORGAN,
Movant and Plaintiff,
Attorney For Movant And Plaintiff.

AFFIDAVIT

STATE OF KANSAS
County of Leavenworth, ss:

Daniel Morgan, being first duly sworn according to law, deposes and says:

That he is the person named as the plaintiff in the above styled cause and as such is the movant in the foregoing and annexed motion for order compelling answers to interrogatories, or, in the alternative, for judgment by default; that he has read the said motion and is acquainted with and understands the contents thereof; and that all the allegations, statements and averments therein contained are true and correct.

Further affiant sayeth not.

/S/ DANIEL MORGAN.

Subscribed and sworn to before me this —— day of September A.D. 1966.

[Caption Omitted]

NOTICE OF MOTION FOR ORDER COMPELLING ANSWERS, OR, IN THE ALTERNATIVE FOR JUDGMENT BY DEFAULT

[Filed Sep 14, 1966]

To: John T. Willingham, Defendant.

Please take Notice that the undersigned has filed in the United States District Court For The District of Kansas, at Topeka, Kansas, a motion for an order compelling answers to interrogatories, or, in the alternative, for judgment by default, in the above styled cause; that a copy of said motion for order compelling answers, or, in the alternative, for judgment by default is annexed hereto and made a part hereof as though fully set forth at length herein.

Dated 9–12–66.

/S/ DANIEL MORGAN,
Attorney for Plaintiff.

CERTIFICATE OF MAILING

I, the undersigned, Daniel Morgan, plaintiff and Attorney for the plaintiff, do hereby certify that I caused a copy of the foregoing annexed Notice of Motion For Order Compelling Answers, Or, In The Alternative, For Judgment By Default

to be mailed in a franked envelope from the United States Penitentiary at Leavenworth, Kansas, on September —— 1966, to Newell A. George, United States Attorney for the District of Kansas, directed to the attention of Elmer Hoge, Assistant United States Attorney for the District of Kansas, Attorneys for the above named defendant, at their address P.O. Box 1537, Topeka, Kansas 66601.

/S/ DANIEL MORGAN,
Attorney for Plaintiff.

[Caption Omitted]

MOTION FOR SUMMARY JUDGMENT

[Filed Oct. 7, 1966]

Come now the defendants in the above-entitled action, John T. Willingham, Warden of United States Penitentiary, Leavenworth, Kansas; and C. A. Jarvis, M.D., and move for summary judgment in favor of said defendants as to all of the allegations contained in plaintiff's pleadings on the grounds that as revealed by all of the pleadings and evidence in the above-entitled case, the defendants were and are immune from suit.

NEWELL A. GEORGE,
United States Attorney.
/S/ James R. Ward
JAMES R. WARD,
Assistant United States Attorney, Post Office Box 1537, Topeka, Kansas 66601, Attorney for Defendants.

CERTIFICATE OF MAILING

I do hereby certify that I mailed a copy of the above and foregoing Motion for Summary Judgment to Daniel Morgan, United States Penitentiary, Leavenworth, Kansas 66048, this 7th day of October, 1966.

/S/ James R. Ward
JAMES R. WARD,
Assistant United States Attorney.

CLERK'S NOTE

October 14, 1966:

At Topeka, Templar-J:

Defts' motion for enlargement of time to answer or object to interrogatories—passed.

Defts' motion for summary judgment—passed.

Pltf's motion to remand—taken under advisement.

Pltf's motion for order compelling answer to interrogatories or in alternative for judgment by default—passed.

Counter designation: Pltf—Kansas City; Deft—Topeka—passed.

Pltf's oral motion to dismiss Ct. 1, 2, 3, 8, 10—sustained.

[Caption Omitted]

RULING ON PLAINTIFF'S MOTION TO REMAND

[Filed Oct. 5, 1966]

On July 27, 1966 plaintiff brought an action against defendants John T. Willingham and C. A. Jarvis jointly and severally charging them along with seventy-five co-defendants with torts committed "in their capacity as individuals or private persons" the verified complaint filed in the State District Court for Leavenworth County, Kansas contained ten separate counts.

On August 15, 1966 an answer was filed by the United States Attorney for the District of Kansas in the Leavenworth County State Court which purported to be an answer of defendants John T. Willingham and C. A. Jarvis denying in general terms the charges and accusations of the complaint. This answer consisted of what might be termed a general denial.

On August 25, 1966 the defendants Willingham and Jarvis filed in this Court their petition for removal of action to the United States District Court from the State District Court of Leavenworth County, Kansas. An appropriate bond for removal was approved and filed and the matter was removed to this Court in the manner prescribed by law.

Thereafter and on September 2, 1966, plaintiff herein filed a motion to remand the action to the State Court from which it had been removed.

Upon hearing before this Court the plaintiff requested leave to dismiss Counts 1, 2, 3, 8 and 10 of his original verified complaint. The Court sustained this motion and there remains for consideration before the Court the claims and charges

asserted in Counts 4, 5, 6, 7 and 9. Count 4 of the complaint charges in substance that defendant ordered and utilized penitentiary inmates and other persons not qualified to administer dangerous drugs to him and to practice medicine in the State of Kansas and to innoculate him with deleterious foreign substances, serum or drugs resulting in his permanent injury; in Count 5 plaintiff charges that as a result of the injection of serum or drug into his body by defendants he was caused to lose consciousness, fall to the concrete floor and injure his head and various parts of his body; in Count 6 plaintiff charges defendants with negligently and wrongfully manufacturing and engaging in the transshipment, facilitation, sale, delivery or distribution, for human use or consumption, certain deleterious foreign substances, vaccines, serums or drugs capable of causing death or serious injury to the user or recipient without attaching to the same an adequate or proper label giving notice of its dangerous or deadly qualities, and failing to include adequate directions for its proper use, all of which caused injury and hurt to the plaintiff; Count 7 charges that as a direct result of the use of such drugs and serums, the plaintiff was caused to lose consciousness and fall to a concrete floor and as a result suffered the injuries described in Count 5; in Count 9 the defendants are charged with wilfully, wantonly and wrongfully and contrary to law, assaulting, battering, choking and torturing the plaintiff, and severely injuring him in various parts of his body.

In their petition for removal the defendants assert that the defendant Willingham is and was at all times pertinent the Warden of the United States Penitentiary at Leavenworth, Kansas in which place plaintiff was confined by a lawful judicial judgment; that the defendant C. A. Jarvis is and was at all time pertinent an employee of the United States Public Health Service assigned to the United States Penitentiary at Leavenworth, Kansas, and as such was an officer of the United States and a person acting under officers of the United States; that any act or thing that the defendants or either of them may have done or authorized to be done concerning the plaintiff as is alleged in his complaint, was done and made by them in the course of their duties as officers of the United States and as persons acting under officers of the United States and under color of such officers and by virtue thereof; that pursuant to the provisions of Title 28 United States Code § 1442(a)(1) peti-

tioners are entitled to have the cause removed to the United States District Court for the District of Kansas. The defendants further assert in their petition for removal that they do not know the identity of any of the persons referred to as First Doe Corporation, Second Doe Corporation, and Roe Company and Doe numbers 1 through 72, as co-defendants with them.

The Court has reviewed authorities cited by the plaintiff in support of his contentions that this is an action brought against the defendants personally and not against them as officers of the United States, and that they are personally liable to him for their tortuous acts committed as individuals with malice and purposely. That defendants would be personally liable to plaintiff in the State of Kansas under such circumstances can scarcely be questioned. See *Farmer* v. *Rutherford*, 136 Kan. 298, 15 P. 2d 474.

Though this is the law of Kansas, the defendants here seek to remove the action brought against them under the provisions of Section 1442, Title 28 U.S.C. Section (a)(1) provides that:

> "Any officer of the United States or any agency thereof or person acting under him for any act under color of such office or on account of any right, title or authority claimed under any Acts of Congress for the apprehension or punishment of criminals or the collection of the revenue."

An examination of the authorities reveal that under the Removal Statute, 28 U.S.C. § 1441, before a case can be removed it is necessary for the facts upon which the removal is based to appear on the face of the complaint or subsequent amendments thereto, filed by thes plaintiff. *Romick* v. *Beckins*, 197 F. 2d 369. This is because the action may be removed under Section 1441 only where it is one over which the federal courts would have original jurisdiction in the first instance. But this rule does not apply where a defense is asserted based upon a federal right of removal granted under the provisions of 28 U.S.C. § 1442(a)(1) under which the removal of this case was sought and obtained. The removal in this case is based on federal interest in the matter, the facts underlying which may be stated in the removal petition itself, and from it determined whether or no federal jurisdiction existed over the claim as stated in the complaint as originally filed and served.

Where a federal officer asserts a privilege for acts done under color of his office, the defense is based upon a federal right, the

purpose of which is to prevent federal employees from being unduly harassed by vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. *Barr* v. *Matteo*, 360 U.S. 564. The federal government has a special interest in such matters which justifies the granting or removal jurisdictions to the federal court in such cases. Congress has not in Section 1442, as in Section 1441, required that the case be one over which the Court have original jurisdiction in order for the defendant to obtain removal. In the revision of Title 28 United States Code Act of June 25, 1948, c. 686, 52 Stat. 938, the right of removal was extended to apply to all officers and employees of the United States or any agency thereof. See Reviser's note 28 U.S.C.A. § 1442. As the case now stands before the Court, the motion to remand must be denied. Necessarily if, upon hearing of the case, it should develop that the acts of the defendants though allegedly done by them while acting under color of their office, were not so committed, then the Court, upon a renewal of plaintiff's motion to remand, would further consider it.

The Court is aware, as plaintiff urges, that the government is not liable for the intentional torts of its employees, 28 U.S.C. § 2680(h), but where the issue is raised by proper and sufficient allegations in the petition for removal as here, that whatever acts were done by the defendants or either of them, were acts required of them in performance of their responsibilities and duties as public officers and performed under color of such office, then the action becomes removable and the issue presented to this Court for determination. The case of *United States* v. *Muniz*, 374 U.S. 150, an examination of this decision reveals that it was an action maintained by a federal prisoner under the Federal Tort Claims Act to recover damages he suffered for personal injuries sustained by him during confinement in a federal prison and resulting from negligence of a government employee. The Court simply held that such an action is maintainable. This is no authority for the contentions advanced by plaintiff here.

The right of removal of this cause, is sustained under the pleadings by *Jones* v. *McGill*, 46 F. 2d 334, and *Poss* v. *Lieberman*, 299 F. 2d 358.

In cases removed under Section 1442 of the statute it is not necessary that all of the parties defendant join in the petition for removal. A single federal officer may obtain removal and

this ends the power of the State Court to issue process because the entire case comes to the jurisdiction of the Federal Court. See *Allman* v. *Hanley*, 302 F. 2d 559.

It follows that plaintiff's motion to remand this cause to the State Court must be and is hereby overruled and denied.

There remains for the Court's consideration in this matter the motion of the defendants Willingham and Jarvis for summary judgment. Plaintiff was granted fifteen days from October 13, 1966 to file answer to the government's brief, after which the Court will rule upon such motion.

DATED at Topeka, Kansas this 18th day of October, 1966.

/S/ GEORGE TEMPLAR,
United States District Judge.

[Caption Omitted]

AFFIDAVIT OF JOHN T. WILLINGHAM IN SUPPORT OF MOTION FOR SUMMARY JUDGEMENT

[Filed Oct. 21, 1966]

STATE OF KANSAS,
Leavenworth County, ss:

JOHN T. WILLINGHAM, of lawful age, being first duly sworn upon oath, deposes and says:

That he is one of the defendants in the above entitled action. That he is Warden of the United State Penitentiary, Leavenworth, Kansas, and is employed by the Department of Justice, Bureau of Prisons, and has a Civil Service rating of GS–16. He has been employed by the Bureau of Prisons, Department of Justice, for a period of twenty-seven years. On January 19, 1965, he became the top field executive administrator and Warden of the United States Penitentiary, Leavenworth, Kansas. As the Warden, he is in complete charge and totally responsible for directing all activities of said Penitentiary designed for the safekeeping, rehabilitation and reformation through training and treatment of male prisoners considered to be habitual or professional criminals requiring maximum supervision in the most secured custodial housing facilities. The institution is divided into two components. The main institution contains twenty-two acres within the walled area of the Penitentiary surrounded by an adjoining 975 acres of farm land. The second component is a farm camp located across the Missouri River some three miles from the institution on an additional 809 acres

of farm land. At these locations are housed a total of 2,059 inmates. These prisoners are committed to serve sentences ranging from one year and one day to natural life.

As the highest field executive, he exercises responsibility for administrative and organizational control over the functions of three major or organizational divisions:

a. Bureau of Prisons—providing staff facilities, supplies and equipment for incarceration, physical necessities, correctional and rehabilitative treatment of prisoners.

b. Federal Prison Industries, Inc.—a self-supporting, government-owned corporation operating industrial and manufacturing activities, providing employment and training for prisoners and producing articles and commodities or rendering services on a basis comparable to private industry.

c. Public Health Service—providing medical and psychiatric diagnoses, treatment and hospital facilities for prisoners. Professional medical staff and technicians are detailed by U.S. Public Health Service.

Under general administrative direction of the Director, Bureau of Prisons, full authority and responsibility has been delegated to carry out directives of the Federal Courts and the Attorney General; for planning, directing and coordinating institutional programs covering very broad, diverse and complex phases of security discipline and rehabilitative treatment of prisoners; for administrative direction of personnel, fiscal and business management functions of the institution, including organizational control over Federal Prison Industries. Within the framework of broad functional and treatment policies of the Bureau of Prisons, the Warden establishes and carries into effect policies governing all institutional operations, conduct and discipline of both prisoners and employees. By delegation of authority to staff administrative officials, he establishes responsibilities for each institutional position and maintains administrative control.

As Warden, he

1. Plans, directs and coordinates broad and varied inmate training, rehabilitation, disciplinary and work progams, extending into every function and service of the institution.

2. Reviews security plans and procedures, directs their preparation and/or modification to assure prisoner detention and control. Makes frequent and regular inspections of all areas to appraise the progress and effectiveness of programs and policies.

3. Administers the several institutional departments, integrates and coordinates them toward the achievement of major goals.

4. Directs a staff of approximately 417 employees in a wide variety of professional, industrial and occupational functions and services necessary to provide the care custody and treatment of prisoners; to operate and maintain the physical plant and facilities including extensive farming operations and manufacturing enterprises, and to furnish administrative, business, fiscal and personnel services and property management.

5. Administers an institutional budget aggregating $3,500,000.00 annually. Initiates special repair and improvement projects, approves contracts and accounts for the utilization and expenditure of resources. Administers the trusteeship responsibility of the government for personal funds of prisoners confined in the institution.

Plaintiff, Daniel Morgan, is an inmate at the United States Penitentiary, Leavenworth, Kansas, and was received at that institution March 17, 1966. That the only contact that said John T. Willingham has had with said Daniel Morgan has been inside the walls of the United States Penitentiary, Leavenworth, Kansas, and in performance of John T. Willingham's official duties as Warden of said institution.

JOHN T. WILLINGHAM.

SUBSCRIBED and SWORN to before me, this 21st day of October, 1966.

/S/ CARL F. ZARTER,
Administrative Assistant,
Classification & Parole.

CERTIFICATE OF MAILING

I do hereby certify that I mailed a copy of the above and foregoing Affidavit of John T. Willingham in Support of Motion for Summary Judgment to Daniel Morgan, United States Penitentiary, Leavenworth, Kansas, 66048, this 24th day of October, 1966.

/S/ James R. Ward
JAMES R. WARD,
Assistant United States Attorney, District of Kansas, P.O. Box 1537, Topeka, Kansas 66601, Attorney for Defendants.

[Caption Omitted]

AFFIDAVIT OF C. A. JARVIS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

[Filed Oct. 24, 1966]

STATE OF KANSAS,
Leavenworth County, ss:

C. A. JARVIS, being first duly sworn upon oath and being of lawful age, deposes and says:

That he is one of the defendants in the above entitled action, and that his true name is Charles A. Jarvis, M.D., age 41 years; that he graduated from the Medical School of the Johns Hopkins University, receiving a degree of M.D. therefrom in 1948; that from 1948 to the present he has been employed as a Medical Director, U.S. Public Health Service, and for the last five years has been assigned to the United States Department of Justice, Bureau of Prisons, at Leavenworth, Kansas. Since July 1965 he has been Chief Medical Officer at the United States Penitentiary, Leavenworth, Kansas.

As such he is in charge of the hospital located within the United States Penitentiary, Leavenworth, Kansas, and is responsible for the medical care and treatment of 2059 inmates and 417 employees at such institution.

He is an active practicing surgeon and diagnoses and treats surgical cases at said institution. As the Chief Medical Officer, he has overall administrative responsibility for the conduct of the prison hospital and the medical care and treatment of the inmates and employees. His responsibilities include the promulgation of rules and guidelines for the operation of the prison hospital and the supervision of the medical staff consisting of three physicians, two dentists, and one clinical psychologist, seven medical technical assistants and 65 inmates employed as nurses, clerks, technicians and orderlies.

He has responsibility for determining the need for and suitability of all types of drugs and medicines used at said institution, the purchasing of the same, as well as the administration of such drugs and medicines.

He is the Chairman of the Administrative Staff Meetings at said hospital, as well as the Chairman of the Clinical and Pathological Meetings held each month with the medical staff thereof.

The plaintiff, Daniel Morgan, was received at the United States Penitentiary, Leavenworth, Kansas, March 17, 1966. The only contact the said C. A. Jarvis has had with Daniel Morgan has been at the prison hospital in the United States Penitentiary, Leavenworth, Kansas, and only in the performance of said C. A. Jarvis' duties as Chief Medical Officer and only with regard to medical care and treatment, diagnoses and routine physical examination.

/S/ C. A. Jarvis
C. A. JARVIS.

SUBSCRIBED and SWORN to before me, this 21st day of October, 1966.

/S/ CARL F. ZARTER,
Administrative Assistant,
Classification & Parole.

CERTIFICATE OF MAILING

I do hereby certify that I mailed a copy of the above and foregoing Affidavit of C. A. Jarvis in Support of Motion for Summary Judgment to Daniel Morgan, United States Penitentiary, Leavenworth, Kansas, 55048, this 24th day of October, 1966.

/S/ James R. Ward
JAMES R. WARD,
Assistant United States Attorney, District of Kansas, Post Office Box 1537, Topeka, Kansas 66601, Attorney for Defendants.

[Caption Omitted]

VERIFIED OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Filed 11-3-66]

The plaintiff, Daniel Morgan, respectfully opposes the motion for summary judgment, made and interposed by counsel for the defendants Willingham and Jarvis, says and alleges:

A

That the moving defendants are positively not immune from liability in this lawsuit by reason of the following facts:

1. *That whatever immunity said defendants ostensibly possessed was waived pursuant to their failure to timely and properly assert the same.*

2. *That although said defendants were employed at the United States Penitentiary, Leavenworth, Kansas, they were not acting within the course and scope of their employment, or in performance of any official duty, or in exercise of any rightful or lawful authority, as employees of the United States, at the time the acts complained of in this lawsuit were perpetrated by them.*

3. *That said defendants acted beyond, and outside, the outer perimeter of their line of duty, as employees of the United States, at the time the acts complained of in this lawsuit were perpetrated by them.*

4. That the acts complained of in this lawsuit were perpetrated by said defendants in violation of and contrary to the terms, requirements, orders, instructions, regulations and conditions of their employment, duty and authority as promulgated by the Attorney General of the United States.

5. That the acts complained of in this lawsuit were perpetrated by said defendants in violation of and contrary to the laws of the State of Kansas and of the United States.

6. *That the perpetration of the acts complained of in this lawsuit had no relevancy to said defendants' employment, duty or authority as officers or employees of the United States or as persons acting under officers of the United States.*

B

1. That at all times pertinent to the case, the plaintiff was not engaged or involved in the act of escaping, plotting or attempting to escape, or in assaulting, attacking or injuring or attempting to assault, attack or injure any person, or in abusing or attempting to abuse any person, or in destroying or attempting to destroy property, or in breaching or attempting to breach any law, or in breaching or attempting to breach the peace, or in violating or attempting to violate any rule of the prison.

2. That at all times pertinent to the case, the plaintiff did nothing whatsoever to cause or provoke, warrant or justify the personal attacks or private torts of these defendants, as alleged in the verified complaint filed in this lawsuit.

C

1. That the acts complained of in this lawsuit were perpetrated by said defendants out of personal hatred and private malice, completely unconnected with their lawful employment, duty, authority or responsibility as officers or employees of the United States.

2. *That the acts complained of in this lawsuit were perpetrated by said defendants while they were on a private excursion, frolic or venture of their own, exclusively designed for their own personal gratification and self-interest, in reckless disregard of the life and limb of the plaintiff and in defiance of law.*

3. *That the acts complained of in this lawsuit were perpetrated by said defendants under the stimulus or influence, and as a result of imbition or ingestion by them, of alcohol or other intoxicants.*

D

This opposition to defendants' motion for summary judgment is also *made and based on the verified complaint for damages, heretofore filed herein, and on all the files, papers, affidavits,* interrogatories, subpenas, records, exhibits, pleadings, motions, petitions, testimony and proceedings heretofore, or which hereafter may be had and obtained in said case; *all and each of which are, by this reference, made a part of this opposition to defendants' motion for summary judgment, as though repeated at length herein.*

E

CONCLUSION

For the foregoing reasons it is submitted that the defendants' motion for summary judgment should be summarily denied.

Respectfully submitted,

/S/ DANIEL MORGAN,
Plaintiff and Attorney for the plaintiff.

AFFIDAVIT

STATE OF KANSAS
County of Leavenworth, ss:

Daniel Morgan, having been first duly sworn according to law, upon his oath says and depoes:

That he is the person named as the plaintiff in the above styled case and as such is the opposing party in the foregoing and annexed "Opposition to defendants' Motion For Summary Judgment"; that he has read said "Opposition to defendants' Motion For Summary Judgment" and is acquainted with and understands the contents thereof; and that all the allegations, statements and averments therein contained are true and correct to the best of his knowledge and belief.

Further affiant sayeth not.

_____

Affiant and Plaintiff.

Subscribed and sworn to before me by the above-named Daniel Morgan, affiant, at my office in the United States Penitentiary at Leavenworth, Kansas, this —— day of ————, 1966.

_____.

[Caption Ommitted]

Memorandum of Decision

SUSTAINING MOTION OF DEFENDANTS WILLINGHAM AND JARVIS FOR SUMMARY JUDGMENT

[Filed Dec. 14, 1966]

The files and records of this case disclose that on July 27, 1966 plaintiff brought an action against defendants John T. Willingham and C. A. Jarvis jointly and severally charging them, together with 75 co-defendants for tort committed "in their capacity as individuals or private persons". The verified complaint filed in the state district court for Leavenworth County, Kansas contains ten separate counts.

On August 15, 1966 a pleading was filed by the United States Attorney for the District of Kansas in the Leavenworth County State Court which purported to be an answer for the defendants John T. Willingham and C. A. Jarvis, which answer denied in general terms the charges and accusations contained in the complaint. The answer consisted of what might properly be termed a general denial.

On August 25, 1966 defendants Willingham and Jarvis filed in this Court their petition for removal of the action from the State Court to this Court. This Court considered the motion of plaintiff to remand the case to the District Court of Leaven-

worth County, Kansas and on October 18, 1966 that motion was denied and this Court retained jurisdiction of the case.

In the meantime defendants John T. Willingham as Warden of the United States Penitentiary at Leavenworth, Kansas, and C. A. Jarvis as Chief Medical Officer of that institution filed their joint motion for summary judgment in favor of defendants and against plaintiff on the grounds that all of the allegations contained in the plaintiff's pleadings and evidence in the record of the above entitled case discloses that defendants were and are immune from suit of the kind and nature alleged in plaintiff's complaint against them.

The suit as instituted by plaintiff originally contained ten counts. Plaintiff requested leave to dismiss Count 1, 2, 3, 8 and 10, which leave was granted by the Court and those Counts were dismissed. There remains for the Court's consideration the claims and charges asserted by plaintiff in Counts 4, 5, 6, 7 and 9 of the complaint. Count 4 of the complaint charges in substance that defendants ordered and utilized penitentiary inmates and other persons not qualified, to administer dangerous drugs to him and to practice medicine in the State of Kansas, and to inoculate him with deleterious foreign substances, serum or drugs resulting in his permanent injury; in Count 5 plaintiff charges that as a result of the injection of serum or drug into his body by defendants that he was caused to lose consciousness, fall to the concrete floor and injure his head and various parts of his body; in Count 6 plaintiff charges defendants with negligently and wrongfully manufacturing and engaging in the trans-shipment, facilitation, sale, delivery or distribution, for human use or consumption, certain deleterious foreign substances, vaccines, serum or drugs capable of causing death or serious injury to the user or recipient without attaching to the same an adequate or proper label giving notice of its dangerous or deadly qualities, and failing to include adequate direction for its proper use, all of which caused injury and hurt to the plaintiff; Count 7 charges that as a direct result of the use of such drugs and serums, the plaintiff was caused to lose consciousness and fall to the concrete floor and as a result suffered the injuries described in Count 5; in Count 9 the defendants are charged with willfully, wantonly and wrongfully and contrary to law, assaulting, battering, choking and torturing plaintiff and severely injuring him in various parts of his body.

Plaintiff has filed his verified statement in opposition to

defendants' motion for summary judgment in which he asserts that: "the acts were perpetrated by defendants out of personal hatred and private malice completely unconnected with their lawful employment, duty, authority or responsibility as officers or employees of the United States; that defendants, though employed at the penitentiary were not acting within the scope and course of their employment or in performance of any official duty or in the exercise of any rightful or lawful authority as employees of the United States; that they acted beyond and outside the outer perimeter of their line of duty as employees at the time of the acts complained of; that the acts complained of were perpetrated by defendants in violation of their instructions, regulations and orders promulgated by the Attorney General of the United States; that the acts were perpetrated contrary and in violation of the laws of Kansas and the United States; that the acts complained of had no relevancy to the defendants' employment, duty use, all of which caused injury and hurt to the plaintiff; Count 7 charges that as a direct result of the use of such drugs and serums, the plaintiff was caused to lose consciousness and fall to the concrete floor and as a result suffered the injuries described in Count 5; in Count 9 the defendants are charged with willfully, wantonly and wrongfully and contrary to law, assaulting, battering, choking and torturing plaintiff and severely injuring him in various parts of his body.

Plaintiff has filed his verified statement in opposition to defendants' motion for summary judgment in which he asserts that: "the acts were perpetrated by defendants out of personal hatred and private malice completely unconnected with their lawful employment, duty, authority or responsibility as officers or employees of the United States; that defendants, though employed at the penitentiary were not acting within the scope and course of their employment or in performance of any official duty or in the exercise of any rightful or lawful authority as employees of the United States; that they acted beyond and outside the outer perimeter of their line of duty as employees at the time of the acts complained of; that the acts complained of were perpetrated by defendants in violation of their instructions, regulations and orders promulgated by the Attorney General of the United States; that the acts were perpetrated contrary and in violation of the laws of Kansas and the United States; that the acts complained of had no relevancy to the

defendants' employment, duty or authority as agents of the United States; that the acts complained of were committed while defendants were on a private frolic, excursion or venture of their own and in reckless disregard of life and limb of the plaintiff and that the acts were complained of while defendants were under the influence of alcohol or other intoxicants."

These statements made by plaintiff are conclusionary and do not change the situation about which there is no dispute; there is no question but what plaintiff was legally committed to the custody of the Warden (plaintiff swears that he was kept under lock and key). It was the duty of defendant Jarvis as Chief Medical Officer to give plaintiff such medical treatment as in his opinion plaintiff required. If in the performance of these duties and while exercising their responsibility, the acts charged by plaintiff were committed by defendants, legal aspects are not changed by the claim of plaintiff that defendants were not acting within the scope of their authority, or in course of their employment, or in exercise of any rightful authority as employees of the United States, or even that they acted contrary to the regulations and orders promulgated by the Attorney General or that the acts had no relevancy to their employment, duty or authority or that they were intoxicated. Conclusionary statements that would not be admissible in evidence at a trial (F.R.C.R.56(e)) do not support the contention made by plaintiff that the conduct of defendants was outside the scope of their authority or jurisdiction, though the acts may have been wrongful and could subject the defendants to severe criticism and condemnation. See *Walling* v. *Fairmont Creamery Company*, 139 F. 2d 318, 323.

Nor can plaintiff's right to recover be based on the rule announced in the case of *United States* v. *Muniz*, 374 U.S. 150, for there the action was brought by a prisoner in a federal penitentiary to recover damages against the United States under the Federal Torts Claim Act because of personal injuries sustained during his confinement in a federal prison and resulting from negligence of a government employee. Furthermore the provision of the Tort Claims Act would not be available to plaintiff in this case because as stated in *Muniz*, the government is not liable for the intentional torts of its employees. The plaintiff here asserts that the outrages perpetrated against him by defendants were committed purposely and maliciously by them. Cf. *Morton* v. *United States*, 228 F. 2d 431 (DC App.).

Plaintiff insists that the defendants, by filing a general denial to his action while the case was pending in the State District Court of Leavenworth County, Kansas, failed to raise the affirmative defense of immunity as required by Rule 8(c), and that they have by such failure waived their right to now advance such a defense under guise of a motion for summary judgment under Rule 56.

As to the amendments the Supreme Court has held in *Foman* v. *Davis*, 371 U.S. 178, that,

> "In the absence of any apparent or declared reason—such an undue delay, bad faith or dilatory notice on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be 'freely given'."

The Court believes that plaintiff mistakes the interpretation of the Federal Rules of Civil Procedure requiring the pleading of affirmative defenses in an initial pleading. As was said in Barron & Holtzoff (Wright Ed.) Vol. 1A § 442 p. 709,

> "Under this Rule (Rule 15) leave to amend pleadings should be granted freely when justice so requires, and the adverse party will not be prejudiced thereby, to clarify the issues and expedite the disposition of litigation. Indeed it is perhaps no exaggeration to say that the only reason for not allowing an amendment to a pleading is prejudice to the opposing party. . . . Prejudice may be found however, where the amendment will cause excessive delay, or where a course of evidence has become unavailable, or a statute of limitations would bar a new suit if opposing parties should lose the present action."

It does not appear that such prejudice exists in this case.

We are considering this case under defendants' motion for summary judgment, and such a motion may be filed at any time before trial and may be considered by the Court if its consideration can be determinative of the issues in the case. The Court is not limited when ruling on a motion for summary judgment to the pleadings on file but in addition to the pleadings, the Court may consider affidavits, admissions, stipulations, depositions which are submitted for or against the motion. *Hahn* v. *Bucyrus-Erie*, 8 F.R.D. 315. The Rule, 56(c), directs that the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admis-

sions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A defendant need not file answer to raise the issue of whether or not, in any event, the plaintiff is entitled to recover. If the Court determines under Rule 56(c) that plaintiff under the facts stated in his complaint, cannot recover on any theory that might be presented under the plaintiff's pleading, then the motion should be sustained.

Plaintiff points out to the Court that before the Court can sustain a motion for summary judgment offered by the defendants in this case, he must find *first*, that there is absolutely no genuine issue of material fact existing in this action; *second*, that defendants are absolutely entitled to judgment as a matter of law in this action; and *third*, both of the above conditions must co-exist in this action before the motion can be sustained. Plaintiff is correct in his statement of the law, but if the defense of immunity in this case must be sustained, then there remains no issue of fact to be determined.

In actions of this kind the Court is required to determine a conflict that arises by reason of the doctrine of executive or official immunity on the one hand, and the protection of the individual citizen against damage caused by the oppressive or malicious action of a public officer. The courts have consistently undertaken to shield responsible government officers from harrassment and inevitable hazards of vindictive or ill-founded damage suits based on acts done in the exercise of their official responsibilities. See *Barr* v. *Matteo*, 360 U.S. 364, 365; and *Gregorie* v. *Biddle*, 177 F. 2d 279, 581, 2 CA.

It has been held that as to judicial and executive officers, the test to determine the existence of immunity from suits for monetary recovery based on allegedly wrongful acts is whether or not the officers were acting within the scope of their authority or in the discharge of their duties. Initially, the broadest interpretation of scope of authority was applied to judicial officers so as to protect them from civil suits to recover for actions taken by them in the exercise of their official functions, irrespective of the motives with which these acts were alleged to have been performed. The doctrine first applied to heads of executive departments and excused them from liability provided the action had more or less connection with the general matters committed by law to their control or supervision. Later the doctrine of broad interpretation began to spread to

subordinate officials, directly leading to the moderan approach or official immunity described in *Gregorie* v. *Biddle*, supra, where it was said:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." 177 F. 2d at 581.

The foregoing statement was approved in *Barr* v. *Matteo*, supra, and in that case the Supreme Court held that the doctrine of executive immunity would apply despite the allegations of malice in the complaint, provided that the action complained of was within the outer perimeter of the officer's line of duty. This is simply another way of stating that the act must have more or less connection with the general matters committed by law to the officer's control or supervision and not be manifestly or palpably beyond his authority. *Norton* v. *McShane*, 332 F. 2d 855, 859.

Again it was said in the *Barr-Matteo* case that the rank of the officer does not determine the applicability of the doctrine of immunity. In that case it was said, p. 573:

> "To be sure, the occasions, upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of *discretion*, it entails. It is not the title of his office by the *duties* with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' Spalding v. Vilas, supra, 161 U.S. at page 498. 16 S.Ct. at page 637—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." 360 U.S. at 572–74, 79 S.Ct. at 1340, 1341. [Emphasis added.]

There is another factor which must be considered in determining the application of the immunity rule in cases of this kind. The Courts have held that to be immune the officer must have been performing a discretionary function and in the case of *Gustavsson Contracting Company* v. *Floete*, 299 F. 2d 655, 659, CA 2, the Court stated, page 659:

> "There is no litmus paper test to distinguish acts of discretion . . . , and to require a finding of 'discretion' would merely postpone, for one step in the process of reasoning the determination of the real question—is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexations or fictitious suits and alleged personal liability?"

The doctrine of official immunity has been applied by Federal Courts in suits brought against numerous officials for many different kinds of torts, and by the great weight of authority, law enforcement officers are immune from civil suits based upon allegedly malicious acts. In the case of *Swanson* v. *Willis*, 114 F. Supp. 434, affirmed in 220 F. 2d 440, CA 9, where a defendant, a former deputy United States Marshal was sued for damages by reason of battery and false arrest of the plaintiff, committed while defendant was arresting or maintaining custody of the plaintiff, it was held that there were no facts alleged

from which it could be inferred that the defendant acted outside the scope of his authority, as that term is explained in *Cooper* v. *O'Connor*, 99 F. 2d 143, discussed in *Hartline* v. *Clary*, 141 F. Supp. 151, 157:

> "In determining whether these defendants acted within the scope of their authority, the Court may properly take official notice of official duties of each and thus determine whether the acts charged fell within the scope of their authority. Cooper v. O'Connor, 99 F. 2d 135, 139. This case held that, in determining this question: 'It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute (United States v. Birdsall, 233 U.S. 223, 230–231, 34 S. Ct. 512, 58 L. Ed. 930); or even that they should be specifically directed or requested by a superior officer. Mellon v. Brewer, 57 App. D.C. 126, 129, 18 F. 2d 168, 171, 53 A.L.R. 1519, certiorari denied, 275 U.S. 530, 48 S. Ct. 28, 72 L. Ed. 409. It is sufficient if they are done by an officer *in relation* to matters committed by law to his control or supervision. (Emphasis supplied.) (Spalding v. Vilas, 161 U.S. 483, 498, 16 S. Ct. 631, 637, 40 L. Ed. 70; and see Lang v. Wood, 67 App. D.C. 287, 288, 92 F. 2d 211, 212); or that they are governed by a lawful requirement of the department under whose authority the officer is acting.'"

Furthermore under the facts of this case, whether immunity is to be afforded these defendants is a matter to be determined under Federal law, *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652, while in common law actions against State officers, the doctrine immunity is governed by State law. *Nesmith* v. *Alford*, 318 F. 2d 110, CA 5. Cf. *Mayor* v. *Cooper*, 6 Wall. 247 and *Tennessee* v. *Davis*, 100 U.S. 267.

Though plaintiff contends his action is grounded on liability imposed on defendants under state law following *Farmer* v. *Rutherford*, 136 Kan. 298, it now convincingly appears from the record that the conduct of defendants was indeed within the outer perimeter of their line of duty. In support of the motion for summary judgment the defendant Willingham has filed his affidavit outlining his duties and responsibilities as Warden of the United States Penitentiary at Leavenworth, Kansas, further showing that plaintiff Morgan is an inmate of the institution, which fact is not denied, and that the only

contact Willingham has had with Morgan has been inside the walls of the United States Penitentiary and in performance of Willingham's official duties as Warden of that institution. Similarly the defendant Jarvis has filed his affidavit in support of the motion for summary judgment in which he states that he is the Chief Medical Officer at the United States Penitentiary at Leavenworth and he is responsible for the medical care and treatment of 2,059 inmates and 417 employees and has the overall administrative responsibility for the conduct of the prison hospital and the medical care and treatment of the inmates and employees, including the supervision of the medical staff and the responsibility for determining the need for and suitability of all types of drugs and medicines used at the institution, the purchasing of the same as well as the administration of them. He further states in his affidavit that the only contact he had with plaintiff Morgan has been in the prison hospital in the penitentiary and then only in the performance of his duties as Chief Medical Officer with regard to the medical care and treatment, diagnosis and routine physical examination of plaintiff.

To offset these sworn statements of defendants, plaintiff has filed a responsive affidavit, stating in substance that he is and has been a prisoner confined in the United States Penitentiary at Leavenworth; that the defendants have waived their defense of immunity in that they had filed an answer in the State Court in which this action was originally instituted, and in which answer no defense of immunity was set forth or alleged and that it was not until the motion for summary judgment was filed that the contention of immunity was brought into this suit; that witnesses by which plaintiff could refute the defendants' claim that their only contact with him was in their official capacity are no longer at the penitentiary and their whereabouts are unknown, and plaintiff cannot now obtain their statements for such refutation; that he has been kept under lock and key and prevented from contacting witnesses and has been prevented from using law books and legal materials that would be helpful to him in presenting his case, and that the conduct of the defendants in belatedly raising the claim of immunity has mislead him and that he has had no opportunity to fairly oppose it. He further states that defendants committed the tortious acts upon him alleged in his complaint while under the influence of alcohol or other intoxicants, without any provocation whatsoever.

The Court has reviewed the entire file in this case, has examined the affidavits and the authorities cited by the parties and many more. The Court is persuaded that none of the specific charges made and stated by plaintiff overcome the undisputed fact that all of the activities of the defendants Willingham and Jarvis and their conduct come within the ambit of their duties and responsibilities as Warden and Chief Medical Officer respectively of the Penitentiary, and the charge that they acted maliciously and without provocation or while under the influence of intoxicating liquor does not remove or restrict the broad rule of immunity. See *Hartline* v. *Clary*, (supra). Also see *Barr* v. *Matteo*, (supra) at page 576 where it was said:

> "To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good."

While it is not raised or contended by the plaintiff, the Court notes in passing that this action cannot be sustained under the authority of the Civil Rights Act, 42 U.S.C. § 1983, for the reason that to sustain an action under that provision of law, the person charged must be acting under color of State law whereas in the instant suit the defendants were acting under color of Federal law. *Paragianakis* v. *The Samos*, 186 F. 2d 257, CA 4.

For the reasons stated above the Court now determines that the complaint fails to state a claim upon which relief can be granted as to the defendants Willingham and Jarvis, therefore, the motion for summary judgment filed by these two defendants must be granted.

IT IS THEREFORE ORDERED that the motion of defendant John T. Willingham and C. A. Jarvis for summary judgment against the plaintiff, Daniel Morgan, be and the same is hereby granted, and the plaintiff's complaint and the cause of action sought to be stated therein against the defendants Willingham and Jarvis is dismissed.

IT IS SO ORDERED.

DATED at Topeka, Kansas this 14th day of December, 1966.

/S/ GEORGE TEMPLAR.
United States District Judge.

United States District Court for the District of Kansas
Civil Action File No. T-4113

DANIEL MORGAN

vs.

JOHN T. WILLINGHAM, C. A. JARVIS, THE FIRST DOE CORPORATION, THE SECOND DOE CORPORATION, THE ROE COMPANY, AND DOE NUMBERS 1 THROUGH 72

JUDGMENT

[Filed Dec. 14, 1966]

This action came on for (hearing) before the Court, Honorable George Templar, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the motion of defendant John T. Willingham and C. A. Jarvis for summary judgment against the plaintiff, Daniel Morgan, be and the same is hereby granted, and the plaintiff's complaint and the cause of action sought to be stated therein against the defendants Willingham and Jarvis is dismissed.

Dated at Topeka, Kansas, this 14th day of December, 1966.

CHARLES W. CAHILL,
Clerk of Court.
By SHARON L. PRATT,
Deputy.

ENTERED IN THE DOCKET December 14, 1966.

ATTEST: A true copy.

CHARLES W. CAHILL,
Clerk.
By SHARON L. PRATT,
Deputy.

[Caption Omitted]

ORDER

[Filed Dec. 23, 1966]

This action was filed by plaintiff in the State District Court of Leavenworth County, Kansas. Defendants Willingham and Jarvis removed the action to this Court under the provisions

of 28 U.S.C. § 1442(a)(1). Plaintiff filed a motion to remand and the Court directed that plaintiff be produced at the hearing of this motion held on October 14, 1960 at which hearing plaintiff offered evidence and argument and submitted brief. The Court thereafter on October 18, 1966 entered its order denying the motion to remand.

Defendants Willingham and Jarvis in the meantime had filed a motion for a summary judgment. Extensive briefs and affidavits, verified statements were filed by both plaintiff and the defendants Willingham and Jarvis.

The Court considered the briefs, the sworn statements of the parties and on December 14, 1966 filed a memorandum of Decision sustaining defendants' motion for summary judgment, following which the Clerk entered a formal order as required by the applicable rule.

Plaintiff files now a motion to correct the record alleging that the judgment recites that the judgment was entered after a "hearing" and after the issues had been "heard" by the Court. Plaintiff claims as reason for his objection and as he contends that there was in fact no "hearing" held and no issues "heard" by the Court.

Technically the plaintiff is correct, no "hearing" was required by Rule 56 and the Court proceeded to make its determination on the record before it as that Rule authorizes and permits. Plaintiff complains that he was not brought out on a writ so that he could appear in Court and present evidence on the motion. He also charges that his motion for "production of documents", his request for subpoenas and his motion to require defendants to answer interrogatories submitted by him were ignored and that this deprived him of an opportunity to fully present his case and make evidence available to support his claims.

The Court considered the "motion for production of documents" and has reviewed all of the fifty-nine interrogatories and the numerous sub-divisions contained in the interrogatories. They are saturated with racial overtones that would have no bearing on the issues of the case. The documents requested in plaintiff's motion and the answers sought by the interrogatories submitted by him to the defendant Willingham could not change the rule of immunity which this Court believes controls the case.

The Court sustains in part plaintiff's motion to correct the judgment entered by the Clerk and directs that the word "consideration" be substituted for the word "hearing", and the word "considered" be substituted for the word "heard". All other requests in the motion are denied.

The Court also denies plaintiff's motion for order compelling answer to interrogatories or in the alternative for judgment by default; denies plaintiff's motion for production of documents; denies plaintiff's petition for a writ of habeas corpus ad testificandum and denies his request as "attorney" for plaintiff for issuance of subpoenas.

IT IS SO ORDERED.

DATED at Topeka, Kansas this 23d day of December, 1966.

/s/ GEORGE TEMPLAR,
United States District Judge.

United States District Court for the District of Kansas

Civil Action File No. T-4113

DANIEL MORGAN

vs.

JOHN T. WILLINGHAM, C. A. JARVIS, THE FIRST DOE CORPORATION, THE SECOND DOE CORPORATION, THE ROE COMPANY, AND DOE NUMBERS 1 THROUGH 72

AMENDED JUDGMENT

[Filed Dec. 27, 1966]

This action came on for consideration before the Court, Honorable George Templar, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that the motion of defendant John T. Willingham and C. A. Jarvis for summary judgment against the plaintiff, Daniel Morgan, be and the same is hereby granted, and the plaintiff's complaint and the cause of action

sought to be stated therein against the defendants Willingham and Jarvis is dismissed.

Dated at Topeka, Kansas, this 27th day of December, 1966.

CHARLES W. CAHILL,
Clerk of Court.
SHARON L. PRATT,
Deputy.

ENTERED IN THE DOCKET December 27, 1966.

ATTEST: A true copy.

CHARLES W. CAHILL,
Clerk.
By SHARON L. PRATT,
Deputy.

In the United States District Court for the District of Kansas

Civil Action No. T–4113

DANIEL MORGAN, PLAINTIFF AND APPELLANT

vs.

JOHN T. WILLINGHAM ET AL., DEFENDANTS AND APPELLEES

NOTICE OF APPEAL

[Filed Jan. 6, 1967]

Plaintiff Daniel Morgan hereby gives Notice that he appeals to the United States Court of Appeals for the 10th Circuit from all adverse rulings and from the final judgment and decision of the above-entitled Court in the above-entitled action, granting "Summary judgment" in favor of defendants, entered herein on December 14, 1966; and from the further and belated order of said Court, denying all of plaintiff's outstanding motions lately pending in said action, entered herein on December 23, 1966; and from the amended judgment entered herein on December 27, 1966.

DANIEL MORGAN,
Plaintiff and Appellant.

Dated: 1–3–67.

United States Court of Appeals Tenth Circuit

September Term 1967

[Filed Oct. 5, 1967]

DANIEL MORGAN, APPELLANT

vs.

JOHN T. WILLINGHAM, AND C. A. JARVIS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Submitted on the Briefs

Appellant pro se.

Newell A. George, United States Attorney and James R. Ward, Assistant United States Attorney, Topeka, Kansas, for appellees.

Before MURRAH, Chief Judge, WILBUR K. MILLER,* Senior Circuit Judge and HICKEY, Circuit Judge.

MURRAH, Chief Judge.

This is an appeal from an order granting a motion for summary judgment in favor of appellees Willingham and Jarvis and dismissing the complaint and cause of action brought against them by appellant, a prisoner at the United States Penitentiary, Leavenworth, Kansas.

Morgan filed this action for damages totaling more than $93,000,000 in the Leavenworth County District Court. The summons and complaint named Willingham and Jarvis, the Warden and Chief Medical Officer at the Penitentiary as the principal defendants.[1] The appellees, through their attorney, filed a general answer in the Leavenworth County District

* Of the United States Court of Appeals for the District of Columbia sitting by designation.

[1] Numerous unidentified individuals and corporations were also named as defendants. Since the complaint was never amended to properly identify them nor were they served with process, they did not become proper parties in the action below and we do not consider any claims against them in this opinion.

Court. The action was then removed to the United States District Court for the District of Kansas.[2]

The appellant then filed a verified motion to remand the cause to the state court. This motion was denied but the trial court stated that it would consider a renewed motion if the facts as subsequently developed, showed the defendants were not acting under color of office.

In substance, the complaint[3] charged that Willingham, Jarvis and others ordered unqualified penitentiary inmates to inoculate the appellant with a "deleterious foreign substance, serum, or drug" which resulted in permanent injury to him. The complaint further alleged that Willingham, Jarvis and others "out of malice * * * did willfully, wantonly or wrongfully, and contrary to the law, assault, batter, club, choke and torture the plaintiff severely injuring [him]."

The appellees then filed a motion for summary judgment and included affidavits of both Willingham and Jarvis. Appellant filed a verified opposition to the motion for summary judgment. In granting the motion, the trial court held that the plaintiff failed to "overcome the undisputed fact that all of the activities of the defendants Willingham and Jarvis and their conduct come within the ambit of their duties and responsibilities as Warden and Chief Medical Officer respectively of the penitentiary and the charge that they acted maliciously and without provocation or while under the influence of intoxicating liquor does not remove or restrict the broad rule of immunity."

This appeal presents two major issues which although related must be treated separately since the authority for the court's action comes from different sources. The primary issue is whether the court properly granted appellee's petition for removal or whether it erred in failing to remand the cause to the state court. The secondary issue is whether the trial court correctly found appellees immune from prosecution and granted summary judgment as to them. For the reasons which follow, we do not reach this secondary issue.

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[2] The record shows that all the requirements of 28 U.S.C. § 1446 were satisfied.

[3] Five of the original ten counts were dismissed on motion of the appellant. Two of the remaining five counts relate to actions of the unidentified corporate defendants and form no part of this appeal. We are therefore only concerned with Counts IV, V and IX of the original complaint.

This action was removed to the federal courts under the provision of 28 U.S.C. § 1442 (a)(1). This section provides for removal of an action commenced in a state court if the defendants are officers of the United States or agency thereof or persons acting under such office and the act complained of was either "under color of such office" or "on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals." It cannot seriously be disputed that the appellees fall within the class of persons covered by the section. The more difficult question concerns whether the acts complained of were committed "under color of office."

It should first be emphasized that § 1442, like the common law doctrine of immunity, presents different standards for different classes of federal personages. An officer of the federal court may remove an action against him if the act was "under color of office or in the performance of his duties." § 1442(a)(3); and see Jones v. McGill, 46 F. 2d 334 (D. New Hampshire 1931); Simpson v. McVey, 217 F. Supp. 575 (S.D. Ohio 1963). A congressional officer may remove an action if the act was "in the discharge of his official duty under order of (either House of Congress)." § 1442(a)(4). In this respect, the removal statutes parallel the common law doctrine of immunity which applies broadly to judicial officers and narrowly to agents of the Executive Branch of the Federal Government.

There is abundant support for the proposition that the "color of office" test which applies to these appellees provide a rather limited basis for removal. State of Ohio v. Dorko, 247 F. Supp. 866 (N.D. Ohio 1965); Nass v. Mitchell, 233 F. Supp. 414 (D. Maryland 1964); Brenner v. Kelly, 201 F. Supp. 871 (D. Minn. 1962); Goldfarb v. Muller, 181 F. Supp. 41 (D.N.J. 1959). Those courts have rejected the contention that the words "under color of office" mean no more than "in the course and scope of employment." Circuit Judge Goodrich suggested that "to make scope and course of employment the test for 'color of office' is * * * to twist the statute out of its rational construction and go far beyond anything that Congress could possibly have intended in its enactment (of the removal statutes)." Ebersole v. Helm, 185 F. Supp. 277, 278 (E.D. Penn. 1960). This rationale accounts for the numerous decisions which hold that removal of a civil suit or criminal prosecution which resulted from the operation of a motor vehicle by one who was

clearly acting within the course and scope of his official government employment is improper and that the case must be remanded to the state court. State of Ohio v. Dorko, supra; Nass v. Mitchell, supra; Galbert v. Shivley, 186 F. Supp. 150 (W.D. Ark. 1960); Ebersole v. Helm, supra; Goldfarb v. Muller, supra; Fink v. Gerrish, 149 F. Supp. 915 (S.D.N.Y. 1957); State of Oklahoma v. Willingham, 143 F. Supp. 445 (E.D. Okla. 1956. *Contra* Pepper v. Sherrill, 181 F. Supp. 40 (E.D. Tenn. 1958); City of Norfolk v. McFarland, 143 F. Supp. 587 (E.D. Va. 1956)..

In Brenner v. Kelly, 201 F. Supp. 871 (D. Minn. 1962), a case which is somewhat analagous to the case at bar, the court held that doctors employed in the Veterans' Administration Hospital were not entitled to remove a malpractice action originally filed in the state court. The holding seems to be premised on the belief that while federal doctors act under the color of office, when operating properly they are not required nor are they authorized to negligently treat patients entrusted to their care and when they do so, they do not act under color of office. To be eligible for removal the defendant must exclude the possibility that the suit is based on acts or conduct not justified by his federal duty. Maryland v. Soper, 270 U.S. 9, 33.

In the case at bar, the trial court erroneously equated the standards which govern common law immunity with those which determine the statutory eligibility for removal of an action commenced in a state court. The only undisputed evidence was that the only contact the appellees had with the appellant occurred within the walls of the penitentiary.[4] While this may have adequately supported the finding of immunity, we find it insufficient to support the requisite determination that the alleged acts were performed under "color of office."

We are thus faced with an apparent divergence in the criteria for the removal of proceedings against federal officers in the state courts and the criteria for determining if the federal officer is immune from prosecution in suit for damages in the federal court. While this divergence is indeed regrettable, its cause is

[4] We agree that the conclusionary statements contained in the appellant's verified answer to the motion for summary judgments were inadmissible under Rule 56(e), Federal Rules of Civil Procedure. However, the statements in appellees' affidavits that their only contact with appellant was in performance of their duties was equally conclusionary and inadmissible. Stone v. Phillips, 245 F. Supp. 247 (D. Colo. 1965).

not unrecognizable. The doctrine of official immunity stems from a common law doctrine which has been expanded by the courts in recent decisions.[5] The test for removal is not based on the evolution of the common law doctrine of immunity, but is a creature of statute and the courts are bound by the language of the statute. The test for removal is not the same as the test for immunity for the former is much narrower than the latter. If these standards are to be equated it must be done through legislative action and not through judicial expansion of the removal statutes.

We conclude that the record fails to establish that the alleged acts were committed under "color of office." The cause must be remanded for a factual determination of this issue.[6] if the evidence does not establish that the alleged acts were committed under "color of office", the cause must be remanded to the state court.

REVERSED AND REMANDED.

MARCH TERM, MONDAY, MARCH 11TH, 1968

DANIEL MORGAN, APPELLANT

vs.

JOHN T. WILLINGHAM ET AL., APPELLEES

Appeal From the United States District Court for the District of Kansas

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Wilbur K. Miller and Honorable John J. Hickey, Circuit Judges.

This cause came on to be heard on the petition of appellees for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

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[5] Compare Norton v. McShane, 332 F. 2d 855 (5 CA 1964) cert. den. 380 U.S. 981, with Kelley v. Dunne, 344 F. 2d 129 (1 CA 1965).

[6] It may be that the answers to some of appellant's interrogations would provide a factual basis for the determination of the removal question. We note that these interrogations were not answered nor do we find that appellees were excused from answering them.

Supreme Court of the United States

October Term, 1967

No. ———

JOHN T. WILLINGHAM AND C. A. JARVIS, PETITIONERS

vs.

DANIEL MORGAN

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 24, 1968.

(S) BYRON R. WHITE,
Associate Justice of the Supeme Court of the United States.

Dated this 10th Day of June, 1968.

Supreme Court of the United States

October Term, 1968

No. 228

JAMES T. WILLINGHAM AND C. A. JARVIS, PETITIONERS

v.

DANIEL MORGAN

ORDER ALLOWING CERTIORARI

Filed December 9, 1968

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1969